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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ..... 71 - 358

UNITED STATES OF AMERICA *ex rel.* WILLIAM EPTON,

Petitioner,

—against—

ALBERT NENNA, WARDEN, MANHATTAN HOUSE OF DETENTION FOR MEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, William Epton, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed the order of the United States District Court for the Southern District of New York denying the petition of William Epton for a writ of habeas corpus.

Citations to Opinions Below

One opinion of Judge Marvin E. Frankel in the District Court is reported at 281 F.S. 388. The other opinion of Judge Frankel is unreported as is the opinion of the Circuit Court. The opinion of the New York Court of Appeals is reported in 19 N.Y.2d 496. All of these opinions are set out in Appendix A *infra* (1a-53a).

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. §2254(1). The judgment of the Circuit Court was entered on June 30, 1971.

Questions Presented

Petitioner William Epton was indicted by the State of New York for the crimes of riot, conspiracy to riot, anarchy and conspiracy to advocate criminal anarchy. During the trial and at the end of the People's case, the court dismissed the substantive riot charge. The defendant was convicted on the other charges, conspiracy to riot, anarchy and conspiracy to advocate criminal anarchy, and given one year on each count to be served concurrently. The questions raised by his conviction are as follows:

1. Whether the New York grand jury which indicted the petitioner—a Negro, poor, and under 35 years of age—was illegally and unconstitutionally selected in violation of the petitioner's right to a fair trial under the Fifth, Sixth and Fourteenth Amendments.

2. Whether the New York Court of Appeals could constitutionally redefine and narrow the anarchy law after it had (with the sanction of this Court) definitively interpreted the statute more than 40 years earlier in *New York* v. *Gitlow*, 234 N.Y. 132 (1922), affd. 268 U.S. 652 (1925), and, without notice, apply it to Epton.

3. Whether, assuming *arguendo* that New York could reinterpret the anarchy statute, the new interpretation

remains unconstitutional because it declares illegal, speech that is protected by the First Amendment as interpreted contrariwise by this Court in *Brandenberg* v. *Ohio*, 395 U.S. 444 (1969) and *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967).

4. Whether Epton's conviction for conspiracy to riot violated his rights under the First Amendment because the overt acts alleged in the indictment and as to which evidence was adduced, were all constitutionally protected speech.

5. Whether the amendment by the trial court of the indictment at the close of the entire case on the conspiracy to riot count—which changed the meaning of the indictment from an accusation that Epton conspired to do acts which actually disturbed the peace, to an accusation that he conspired to do acts which showed that he intended to disturb the peace—deprived him of due process under the Fifth and Fourteenth Amendments.

6. Whether, assuming *arguendo* the validity of the conspiracy to riot count, this Court may yet now reach the constitutional validity of the anarchy counts in the light of this Court's ruling in *Benton* v. *Maryland*, 395 U.S. 784 (1969) on the issue of concurrent sentences—particularly where the substantive anarchy charge is a felony and the conspiracy to riot is a misdemeanor.

7. Whether there was any evidence at all that Epton advocated or conspired to advocate the overthrow of the government of the State of New York, or that he conspired with others to do acts which "disturbed the public peace."

Statutory Provisions Involved

The statutory and constitutional provisions directly involved in this petition are:

Former New York Judiciary Law §596 (concerning qualifications of grand jurors); former New York Penal Law §§160, 161 (anarchy), 580 (conspiracy), 2090 (riot).

Constitutional provisions including the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution. The text of the enumerated sections of the New York law is set forth *in haec verba* in Appendix B *infra* (54a-57a).

Statement of the Case

Present Proceeding

Petitioner sought federal habeas corpus relief from his conviction in the New York State Court in Manhattan of anarchy, conspiracy to advocate criminal anarchy and conspiracy to riot in January 1966 under "old" New York Penal Law §§160, 161, 580, 2090[1] and his sentence of one year in the City Penitentiary on each of the three counts to be served concurrently. Petitioner has been free on $25,000.00 bail since March of 1966 with the exception of two weeks in February 1968 while Judge Frankel considered the substantiality of the issues and the appropriateness of bail pending this proceeding (281 F.S. 388). The Court of Appeals has continued the bail and stayed the remittitur until final disposition by this Court. Epton has six months to serve in the City Penitentiary on the concurrent sentences.

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[1] These sections were all repealed by the recodification of the penal law passed by the New York State Legislature on July 20, 1965, effective September 1, 1967.

The Evidence

Judge Feinberg, for the court below, stated the facts to be as follows:

> "Epton's convictions were based upon his activities about the time of the 1964 Harlem riot. That riot began two days after a 15-year old Negro boy was shot and killed by an off-duty white New York Policeman. For some months previously, Epton, as leader of the Harlem branch of the Progressive Labor Movement (P.L.M.),[2] had been making an issue of what he characterized as the policy of brutality by the police against the black residents of Harlem. However, there was no evidence that Epton had any hand in the riots that broke out on the night of July 18. and the trial court dismissed that count of the four-count indictment that had charged Epton with riot in violation of former N. Y. Pen. Law §2090. Even so, Epton was by no means inactive in Harlem during this period. In speeches given on street corners and in the Harlem office of the P.L.M., in conversations with other members of P.L.M. and the public, and in leaflets and posters, Epton spoke out about the need of Harlem residents to organize for self-defense against the police. Without extensive quotation, it is enough to say that the tenor of Epton's remarks was violent at times and they could fairly be characterized as the now familiar militant-revolutionary rhetoric of black power advocates. At the same time, Epton was organizing a mass demonstration for Saturday, July 25, with the 32nd

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[2] "This is a self-described Marxist political organization. The Harlem branch in 1964 apparently had six members, including one police informer."

Police Precinct to be the objective of a march. Although petitioner's application for a demonstration permit was turned down, he went ahead with his plans. [The record shows that the application was for a "peaceful" demonstration with a view to presenting a list of demands to the government of the City of New York]. On July 25, after the rioting had subsided, Epton and a small group attempted to begin their planned march. Instead, Epton was arrested [for disorderly conduct, a charge later dismissed on motion of the District Attorney after his indictment. There was no evidence at the trial of any disturbance or illegal conduct of the defendant on July 25, the day of his arrest].

"Petitioner's conviction was affirmed in the New York State courts, *New York* v. *Epton,* 281 N.Y.S.2d 9 (1967), aff'g, 276 N.Y.S.2d 847 (App. Div. 1966). In the Supreme Court, Epton's petition for a writ of certiorari was denied, and his appeal was dismissed for want of a substantial federal question. 390 U.S. 29, rehearing denied, 390 U.S. 976 (1968), petition for leave to file petition for rehearing out of time denied, 398 U.S. 944 (1970)." [Text in brackets supplied] (2a-4a).

Background

The prosecution of Epton was in the van of a new cycle of prosecutions for anarchy and sedition brought by prosecutors in New York and other states against black citizens. Legal scholars as well as political scientists have been concerned with the New York Court of Appeals opinion affirming the conviction—the first conviction for anarchy in New York in 45 years and the first since that of Benjamin Gitlow in 1921 and its affirmance in this court in 1925. [See "Black

Power Advocacy: Criminal Anarchy or Free Speech," 56 Calif. L. Rev. 702 (1968); "From Gitlow to Epton—New York's Resurrected Criminal Anarchy Statute—the First Amendment and National Policy," 16 New York Law Forum 93 (1970); "Clear and Present Danger Reexamined: Dissonance in the *Brandenberg* Concerto," 22 Stan. L. Rev. 1163, 1171 n. (1970); "Conspiracy and the First Amendment," 79 Yale L.J. 872, 892-894 n. (1970); "Notes on Epton," 19 Syracuse L.R. 130 (1967), 20 Syracuse L.R. 73 (1969)].

Grand Jury

Petitioner has raised in this proceeding the issue of the constitutional validity of the grand jury which indicted him. Although Epton had challenged the composition of the grand jury in pre-trial motions, a full scale hearing had been denied to him. Subsequent to his conviction, however, and the denial of a hearing to him in this Court, the selection process and the composition of that grand jury was judicially examined in a State Supreme Court hearing before Justice John Murtagh. That procedure and that very grand jury that had indicted Epton were approved by the New York Court of Appeals in *People* v. *Chestnut,* 26 N.Y.2d 841 (1970). That record and decision is now before this Court for review in this proceeding. It is also before this Court on a petition for certiorari in *United States ex rel. Chestnut et al.* v. *Criminal Court,* O.T. 1971 Misc. 156. When Epton originally filed his petition for *habeas corpus* in February 1968, the state proceeding in *Chestnut* was in process but undecided.

Opinions Below (Grand Jury)

Accordingly, Judge Frankel postponed his decision until the state proceedings in *Chestnut* were concluded, and finally denied the *habeas corpus* petition with evident ambivalence on October 5, 1970. This same ambivalence finds its expression in the affirmance of the Court of Appeals. Both opinions are in the nature of a court's petition for certiorari to this Court.

In his opinion, Judge Frankel considered "the most serious claim" to be that "the court should infer a pattern of unconstitutional discrimination from the low representation of black people and Puerto Ricans on the New York grand jury" (22a). Nonetheless, he found in accord with the state decision that there was "no showing of purposeful or intentional discrimination against any racial or ethnic group" (22a). Moreover, Judge Frankel accepted the reasoning of the State Court of Appeals in *Chestnut* and found that the system of volunteer grand-jury service—which concededly resulted in *de facto* discrimination on racial, economic, and age lines—was rationally justifiable (23a).

The record of the hearing before Justice Murtagh in *Chestnut* was clear. Prospective grand jurors were chosen by lot from a larger petit jury list; this chance-selected list was then screened by the county clerk; those selected by him were given the option (not available to petit jurors who must serve) of serving on the grand jury. The Legislature at that time and until September 1967, required that the prospective grand juror or his spouse possess assets worth $250.00. Quite apart from this requirement, figures showed that persons of low income were under-represented in the grand-juror rolls—persons who were "blue collar"

workers comprised 47 per cent of the population, but only 1.14 per cent were so identifiable on the grand jury list—and that all persons on welfare were excluded.

The statute further set age limits for service at 21 and 70 years of age. Administration of the statute as to the age requirement, however, excluded persons between the ages of 21 and 35. Although census figures showed the population over 21 to be 24 per cent Negro and 9 per cent Puerto Rican, the grand juror rolls listed only 1.65 per cent Negroes and .03 per cent Puerto Ricans.

At the time of his indictment in 1964, Epton, a Harlem Negro, was 32 years of age and had an income of $20.00 a week. Discrimination against Negroes, the young and the poor thus clearly deprived Epton of a grand jury of his peers—meaning here, persons selected as a fair and representative cross section of persons in his community.

Ruling Below (Anarchy)

As to the anarchy and conspiracy to advocate anarchy counts, the trial judge conceded that *Gitlow* was no longer the law. Accordingly, he attempted to innovate appropriate instructions to the jury from subsequent (to *Gitlow*) opinions of this Court which interpreted (not state sedition laws, but) the *Smith Act* (federal legislation). In so doing, the trial judge changed the law as understood and accepted prior to the Epton indictment in the hope that the new interpretation would pass scrutiny in this Court. Reading in *haec verba* from the statutes the wording of which he conceded was unconstitutional (P.L. §§160, 161), he nonetheless instructed the jury that the defendant's intent rather than his actions were pivotal and that speech itself could

constitute a sufficient overt act to support a conspiracy conviction, whether for anarchy or riot. Nor did he instruct the jury that it had to find such speech connected to any "clear and present danger" of evil consequences the legislature sought to prevent. Anticipating a constitutional challenge to the anarchy statute, the trial judge sentenced Epton to no more than one year on the anarchy count (which carried a maximum of seven years) to run concurrently with the other conspiracy counts (misdemeanors with a maximum of one year) in evident expectation that the conspiracy to riot count would stand and further review would be barred by the doctrine of concurrent sentence.

Ruling and Opinions Below (Riot)

There was no evidence connecting the defendant's speech or pamphleteering to any violence or disturbance of the peace on the days of the Harlem riot. At the conclusion of the prosecution's case, the trial judge conceded that there was no evidence to connect Epton to riot as defined by law.[3] The court, accordingly, dismissed the riot count against Epton.

At the conclusion of the entire case, the court had to face the same issue again because the conspiracy to riot count was drafted in language identical to that of the riot count. The grand jury had charged Epton with conspiring with others to participate in a riot by doing acts "which disturbed the public peace by using force and violence to

[3] Penal Law §2090 defined the crime as follows: "Whenever three or more persons, having assembled for using force or violence to any other person, or to property or threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they are guilty of a riot."

police officers of the City of New York." To circumvent this conclusion in the defendant's favor, the trial judge amended the indictment;[4] in his own words, he did so in order that it make "sense." He changed the crucial word in the indictment, the verb, from the past indicative "disturbed" to the future subjunctive "would disturb." Epton was thus charged (immediately before the case went to the jury) with a crime not of action but of intention. The jury could then look to his speech (characterized by Judge Feinberg as "the now familiar militant-revolutionary rhetoric of black power advocates") and calculate that, even if there was no conspiracy which resulted in the disturbance of the peace which was the crime (and the only crime in that count) charged, it was enough for a finding of guilt if the defendant intended, desired, or would be pleased with a disturbance of the peace. The court below said of this "Johnny come lately" amendment:

> "The amendment was a minor change of grammatical tense and clarified the issue for the jury" (11a).

The amendment certainly "clarified" the issue in that it permitted and suggested a verdict of guilt to the jury which was freed by the new language to turn from consideration of objective evidence to speculation about the defendant's subjective intent, with his public speech and pamphleteering presumably supplying the overt evidence thereof, even though it is a question whether speech and writing are legally sufficient to constitute overt acts to support such a criminal conspiracy.

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[4] A copy of the indictment is set forth in Appendix C, *infra* (58a-64a).

Reasons for Granting the Writ

1. The court below and the New York Court of Appeals have decided (with regard to the grand jury) a federal question of substance in a way not in accord with the applicable decisions of this Court.

As set forth in detail in the petition for certiorari in *United States ex rel. Chestnut* v. *Criminal Court,* O.T. 1971 Misc. 156 the grand jury which indicted Epton, a poor, young Negro, was a jury of predominantly rich, old, white citizens not a cross section of the community where he lived —chosen to serve as volunteers in determining probable cause for the issuance of an indictment. It was a grand jury which the *Chestnut* record showed was unrepresentative of the population in New York under circumstances which had existed for a sufficiently long period of time for notice of its unconstitutional character to be imputed to the authorities, and of which situation there was testimony that there was actual knowledge. *Strauder* v. *West Virginia,* 100 U.S. 303 (1880); *Hernandez* v. *Texas,* 347 U.S. 475 (1954); *Wood* v. *Georgia,* 370 U.S. 375 (1962); *Williams* v. *Florida,* 399 U.S. 78 (1970); *Duncan* v. *Louisiana,* 391 U.S. 145 (1968).

The court below did not discuss this issue as it held itself bound by *United States ex rel. Chestnut* v. *Criminal Court,* slip opinion 2891 (May 5, 1971) and the District Court ruled against petitioner on the grounds of *People* v. *Chestnut,* 26 N.Y.2d 481 (1970) (4a). It was undisputed, however, at the time of the indictment in 1964 and the superseding indictment that the membership of the grand jury was not representative of the New York City population and

was chosen by procedures that discriminated against the non-white, the poor and the young.

The grand jury issue, as developed in the *Chestnut* record and the propriety of which was approved by the State Court of Appeals in 1970 is newly presented to this Court at this time.

2. The validation of Epton's conviction violated principles of due process long established by this Court requiring in all criminal cases that the defendant have notice that the conduct he engages in is proscribed by law. *Cole* v. *Arkansas,* 333 U.S. 196 (1948); *In re Oliver,* 333 U.S. 257 (1948).

Epton had a right, prior to his indictment, to rely on the interpretation of the New York anarchy law by the State's highest court and by this Court in *People* v. *Gitlow,* 234 N.Y. 132 (1922); *Gitlow* v. *New York,* 268 U.S. 652 (1925) and on the doubt cast on that law in *Dennis* v. *United States,* 341 U.S. 494, 507 (1951). He could not be bound to anticipate the innovative interpretation of the State Court of Appeals in *Epton* prior to its declaration in 1967.

Subsequent to its ruling in *Epton* (390 U.S. 29), this Court met squarely the issue posed by petitioner who claimed that the reinterpretation of the anarchy statute after his indictment and conviction was *ex post facto* as to him. In *Shuttlesworth* v. *Birmingham,* 394 U.S. 147 (1969), this Court invalidated a conviction under a state statute which it held to be unconstitutional under the First Amendment even though a later narrowing judicial interpretation would have passed "constitutional muster." Cf. *Bouie* v. *City of Columbia,* 378 U.S. 78 (1935).

The court below considered this and other related questions to be substantial but held (as did the District Court) it was not free to rule on such issues here in view of this Court's action on a prior petition for certiorari and appeal in this case [390 U.S. 29 (1968)]. Moreover, in view of the substantiality of this issue and others, said the court below, this Court is the appropriate tribunal to decide the issue (7a).

3. Since the attempt to bring this case to this Court on direct appeal and the denial of that appeal and the companion petition for certiorari, this Court has made certain judicial rulings which place the case at bar in a different posture from its posture at the time *Epton* was first turned down by this Court, and accordingly, the law established below is now clearly at variance with decisions of this Court.

The New York Court of Appeals opinion was at variance with this Court's opinion in *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967) which certainly seemed to hold New York Penal Law §§ 160 and 161 as written, unconstitutionally void for vagueness. This holding was to be further supported in *Brandenberg* v. *Ohio*, 395 U.S. 444 (1969) where this Court declared unconstitutional a sedition statute, the wording of which was similar to the New York anarchy statute, on the grounds that the statute violated the First and Fourteenth Amendments. In addition, this Court overruled *Whitney* v. *California*, 274 U.S. 357 (1927). *Whitney* and *Gitlow* have been, through the years, considered as parallel cases by this Court. These considerations, however, were deemed unavailable for judicial review in 1968 by at least one Justice of this Court who was disturbed by the

concurrent sentence doctrine expounded in *Lanza* v. *United States,* 370 U.S. 139 (1962) and *Hirabayashi* v. *United States,* 320 U.S. 81 (1943) which doctrine was at least modified, if not overruled in *Benton* v. *Maryland,* 395 U.S. 784 (1969). This Court further, after three arguments in *Samuels* v. *Mackell,* 401 U.S. 66 (1971) did not reach the merits as to the constitutionality of the New York anarchy law. Moreover, this Court in *Samuels* explicitly did not approve the upholding of the anarchy law by the specially convened three judge court below which cited with approval the state Court of Appeals ruling in *Epton* [388 F.S. 348 (S.D.N.Y. 1968)].

The court below considered that this issue should be decided by this Court (7a).

4. Epton's conviction supported in the record by acts of speech only, raises profound issues under the First Amendment not yet decided by this Court.

The analysis of the facts by the court below sheds new light on the contentions of Epton that all the conduct charged as illegal involved speech and expression of ideas and that the proscription of such expression in the absence of any showing (and there was none) of a "clear and present danger" of the evil the legislature had a right to proscribe, invalidated Epton's conviction. *Brandenberg* v. *Ohio,* 395 U.S. 444, 447 (1968); *New York Times* v. *Sullivan,* 376 U.S. 254 (1964). In this connection, the court below underlined the issue that two of Epton's convictions were for conspiracy (to riot and to advocate anarchy) and that at least some (Epton contended all) of the overt acts charged involved speech protected by the First Amendment.

The court below affirmed the District Court, which held that the talk of petitioner in the context of the 1964 Harlem riots met the "clear and present danger" test. The court therewith affirmed the District Court's ruling that certain kinds of speech are not necessarily constitutionally protected. It recognized, however, that the issue is substantive and said if *Yates* v. *United States,* 354 U.S. 298 (1951) "does not now govern this issue, it is for [this] Court rather than for an inferior federal court, to say so" (11a).

It held further, that petitioner could not on this appeal raise the issue whether the jury had been warned against convicting Epton solely on constitutionally protected overt acts, *i.e.* speech, because the issue had not been briefed in the prior proceedings (8a). In this connection, the court conceded that Epton had always maintained, throughout various court proceedings, that his prosecution violated the First Amendment and had specifically excepted to the trial judge's reinstruction of the jury that an act of speech was a sufficient overt act to support conviction (8a). The ruling of the courts below surely constitutes a novel and dangerous (to First Amendment rights) extension of the "clear and present danger" doctrine and, as such, calls for review by this Court.

5. The amendment of the indictment by the trial court at the end of the entire case on the conspiracy to riot count is repugnant to due process as denying notice of the charge against the defendant prior to his trial. It is further inconsistent with decisions of this Court and of the courts of New York State. *Ex parte Bain,* 121 U.S. 1 (1887); *Stirone* v. *United States,* 361 U.S. 212 (1959); *People* v. *Ercole,* 308 N.Y. 432 (1955) reh. den. 308 N.Y. 1007.

The court below held that the change and amendment was insignificant since Epton "could have been convicted of conspiracy to riot whether or not the substantive offense which was the object of the conspiracy was completed," notwithstanding the dismissal of the trial court of the substantive offense similarly worded (11a). The trial court dismissed the riot count because of a complete failure of evidence. But when at the end of the case, the court amended the conspiracy count, it said it was necessary to do so in order for the indictment to make "sense" in the context of this radical change in the posture of the prosecution's case.

6. When this case was before this Court in 1967-1968, the doctrine of concurrent sentence might well have barred review of the anarchy counts if the assumption were made that the petitioner was validly convicted under the conspiracy to riot count. Petitioner was sentenced to one year in prison on the conspiracy to riot charge, a misdemeanor, and to a concurrent sentence on both the anarchy (a felony) and the conspiracy to advocate criminal anarchy (also a misdemeanor).

In *Benton* v. *Maryland,* 395 U.S. 784 (1969), this Court reached an issue involving a concurrent sentence and held that a valid conviction on one count would not bar review of another, although the sentences were concurrent. Thus, now this Court may appropriately reach for decision the anarchy counts, upholding the conspiracy to riot count [despite petitioner's vigorous challenge thereto] and vice versa.

The court below conceded that the *Benton* holding came after this Court's ruling dismissing the appeal and deny-

ing certiorari [390 U.S. 29 (1968)], but said again that the issue was appropriate for decision by this Court (7a).

7. The record is bare of any evidence that petitioner advocated or conspired to advocate the overthrow of the government of the State of New York. There was no evidence of petitioner's advocacy being directed against the State of New York nor of the likelihood that the government of the State of New York would fall ("clear and present danger"). There was further no evidence that his acts, in concert, or otherwise, disturbed the peace as the indictment originally read.

Thus, under the holding in *Thompson* v. *City of Louisville,* 362 U.S. 199, 206 (1960) and *Gregory* v. *Chicago,* 394 U.S. 111, 112 (1969), a conviction in the absence of evidence to support it represents a denial of due process of law. The court below did not discuss this issue.

CONCLUSION

The importance of all the issues, involving as they do basic constitutional rights, requires a hearing of the case by this Court. Both courts below thought the issues substantial and explicitly stated that they were appropriate for review by this Court at this time.

The petition for certiorari should be granted.

Dated: New York, New York
August, 1971

Respectfully submitted,

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APPENDIX A-1

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 459—September Term, 1970.

(Argued December 11, 1970 Decided June 30, 1971.)

Docket No. 35559

UNITED STATES OF AMERICA *ex rel.* WILLIAM EPTON,

Petitioner-Appellant,

—against—

ALBERT NENNA, Warden, Manhattan House of Detention for Men,

Respondent-Appellee.

Before:

LUMBARD and FEINBERG, *Circuit Judges,* and CLARIE, *District Judge.**

Appeal from order of the United States District Court for the Southern District of New York, Marvin E. Frankel, *J.*, denying petition for writ of habeas corpus. Affirmed.

ELEANOR JACKSON PIEL, New York, N. Y. (Melvin L. Wulf, American Civil Liberties Union; Paul Chevigny, New York Civil Liberties Union, on the brief), *for Petitioner-Appellant.*

* Of the District of Connecticut, sitting by designation.

DAVID OTIS FULLER, JR., Assistant District Attorney (Frank S. Hogan, District Attorney, New York County; Michael R. Juviler, Assistant District Attorney, on the brief), *for Respondent-Appellee.*

FEINBERG, *Circuit Judge*:

William Epton appeals from an order of the United States District Court for the Southern District of New York, Marvin E. Frankel, *J.*, denying his petition for a writ of habeas corpus. After a jury trial in the New York State courts, petitioner was convicted in 1966 of criminal anarchy, former N.Y. Pen. Law §§160, 161,[1] conspiracy to advocate criminal anarchy, former N.Y. Pen. Law §§160, 161, 580, and conspiracy to commit riot, former N.Y. Pen. Law §§580, 2090. He was sentenced to three concurrent one-year terms in the city penitentiary. Judge Frankel's opinion, 318 F. Supp. 899, carefully considered petitioner's major arguments and adequately set forth the reasons why habeas relief was denied. Our consideration of the merits of petitioner's most substantial claims is foreclosed both by a recent decision of this court and by the Supreme Court ruling in Epton's prior direct appeal to it. As to the other issues raised before us, we affirm the district court essentially for the reasons stated in its opinion.

Without repeating Judge Frankel's efforts, some background would be helpful. Epton's convictions were based upon his activities about the time of the 1964 Harlem riot. That riot began two days after a 15-year old Negro boy was shot and killed by an off-duty white New York police-

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1 Since Epton's indictment, the New York penal law has been amended. This opinion will refer to the earlier law, under which Epton was tried, as "former N.Y. Pen. Law §——."

man. For some months previously, Epton, as leader of the Harlem branch of the Progressive Labor Movement (P.L.M.),[2] had been making an issue of what he characterized as the policy of brutality by the police against the black residents of Harlem. However, there was no evidence that Epton had any hand in the riots that broke out on the night of July 18, and the trial court dismissed that count of the four-count indictment that had charged Epton with riot in violation of former N.Y. Pen. Law §2090. Even so, Epton was by no means inactive in Harlem during this period. In speeches given on street corners and in the Harlem office of the P.L.M., in conversations with other members of P.L.M. and the public, and in leaflets and posters, Epton spoke out about the need of Harlem residents to organize for self-defense against the police. Without extensive quotation, it is enough to say that the tenor of Epton's remarks was violent at times and they could fairly be characterized as the now familiar militant-revolutionary rhetoric of black power advocates. At the same time, Epton was organizing a mass demonstration for Saturday, July 25, with the 32nd Police Precinct to be the objective of a march. Although petitioner's application for a demonstration permit was turned down, he went ahead with his plans. On July 25, after the rioting had subsided, Epton and a small group attempted to begin their planned march. Instead, Epton was arrested.

Petitioner's conviction was affirmed in the New York State courts. *New York* v. *Epton,* 281 N.Y.S.2d 9 (1967), aff'g, 276 N.Y.S.2d 847 (App. Div. 1966). In the Supreme Court, Epton's petition for a writ of certiorari was denied,

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2 This is a self-described Marxist political organization. The Harlem branch in 1964 apparently had six members, including one police informer.

and his appeal was dismissed for want of a substantial federal question. 390 U.S. 29, rehearing denied, 390 U.S. 976 (1968), petition for leave to file petition for rehearing out of time denied, 398 U.S. 944 (1970).[3]

I.

As already indicated, several of the issues before us do not require extended discussion by this court. The first of these is the argument that Epton was indicted in violation of his constitutional rights because the members of the New York grand jury were selected under a system that discriminated as to race, wealth and age. The district court, and the parties in their briefs in this court, apparently considered this to be the most significant question in the case. However, our consideration of the issue is sharply limited by intervening precedent. Since the decision of the district court in favor of the State on the issue and since the argument of this appeal, this court has ruled, in *United States ex rel. Chestnut* v. *Criminal Court,* slip op. 2891 (May 5, 1971), that the grand jury that indicted Epton was not unconstitutionally selected. Epton raises "the same arguments"[4] that were rejected by this court in *Chestnut.* We, therefore, affirm on this issue.

The other issues that require only brief discussion are those that raise the constitutionality of the New York anarchy law under which Epton was convicted.[5] As we understand appellant's brief, his arguments include the

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3 For a further exposition of the procedural history of this case, see 318 F. Supp. at 901-902.

4 See *People* v. *Chestnut,* 311 N.Y.S.2d 853, 855 n. 1 (1970).

5 In response to *Pennsylvania* v. *Nelson,* 350 U.S. 497 (1956), New York has since amended its anarchy statute so that it applies only to the advocacy of the overthrow by force or violence of the New York State government. N.Y. Pen. Law §240.15, eff. Sept. 1, 1967.

following: (1) the New York Court of Appeals could not constitutionally redefine and narrow the anarchy law in Epton's appeal, 281 N.Y.S.2d 9 (1967), after it had definitively interpreted the statute over 40 years earlier in *New York* v. *Gitlow,* 234 N.Y. 132 (1922), aff'd, 268 U.S. 652 (1925); (2) even if the New York court could reinterpret the statute, the new interpretation remains unconstitutional because it declares illegal speech that is protected by the first amendment, citing, e.g., *Brandenberg* v. *Ohio,* 395 U.S. 444 (1969); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); and, (3) even if the new interpretation of the anarchy statute is constitutional, applying it to Epton violates the due process requirement of adequate notice because Epton could reasonably have expected, in light of modern constitutional law, that a state anarchy statute which had not been invoked since the *Gitlow* prosecution in 1921 was moribund, citing, e.g., *Shuttlesworth* v. *Birmingham,* 394 U.S. 147 (1969); *Bouie* v. *City of Columbia,* 378 U.S. 347 (1964).

These questions are very substantial,[6] but we do not believe that we are free to rule on them in this case. The district court reasoned that the Supreme Court had either decided them or had held that they should not be reached and that this was binding on a lower court under the doctrine of law of the case. *Briggs* v. *Pennsylvania R.R.,* 334 U.S. 304 (1948); *Ex Parte Sibbald* v. *United States,* 37 U.S. 488 (1838); see *Banco Nacional de Cuba* v. *Farr,* 383 F.2d 166, 177-78 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968). We agree. As noted above, the Supreme Court

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6 Cf. *Samuels* v. *Mackell,* 388 F. Supp. 348 (S.D.N.Y. 1968) (three-judge court), aff'd 401 U.S. 66 (1971) (affirmed "solely on the ground that, in the appropriate exercise of the court's discretion, relief by way of declaratory judgment should have been denied without consideration of the merits." 401 U.S. at 73).

dismissed Epton's appeal from the New York decision for want of a substantial federal question, 390 U.S. 29 (1968), and this is a decision on the merits[7] of those issues raised on appeal.[8] While it is not altogether clear, the Court's dismissal was based either on an affirmance of the ruling of the New York Court of Appeals on the substantive issues, or, as indicated in the concurrence of Justice Stewart, *id.*, and the dissent of Justice Douglas, *id.* at 30,[9] on the concurrent sentence doctrine, citing *Lanza* v. *New York*, 370 U.S. 139 (1962); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943).

Petitioner argues that because of recent changes in the concurrent sentence doctrine we should examine the constitutionality of the anarchy law. Citing *Benton* v. *Maryland*, 395 U.S. 784 (1969), he claims that the doctrine no longer states a jurisdictional rule. That may be so, but we are not persuaded to reverse the district court. First, *Benton* does not answer the first branch of the law of the case problem here, i.e., that the Supreme Court considered and summarily affirmed the rulings of the New York Court of Appeals. Second, *Benton* indicates that the concurrent

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7 For the "lively disagreement among respected constitutional scholars concerning the significance of the Supreme Court's dismissal of an appeal," see the authorities collected by Judge Frankel, 318 F. Supp. at 906 n. 8.

8 Although he did not discuss the question, apparently Judge Frankel believed that not only the three issues set forth in the text but also two others, i.e., whether the convictions violated due process because there was no evidence that petitioner advocated the overthrow of the State government and whether the trial court's charge met the requirements of the first amendment, were raised on appeal to the Supreme Court. 28 U.S.C. §1257. We agree. See *Fiske* v. *Kansas*, 274 U.S. 380, 385 (1927); *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, 288-89 (1921).

9 Petitioner also refers to a memorandum of Mr. Justice Harlan concerning his bail application quoted in a letter, dated June 5, 1967, from the Clerk of the Supreme Court to Mrs. Eleanor J. Piel, petitioner's attorney.

sentence doctrine may still exist as a discretionary rule of convenience, 395 U.S. at 791, and we have so assumed. See *United States* v. *Febre*, 425 F.2d 107, 113 (2d Cir.), cert. denied, 400 U.S. 849 (1970); *United States ex rel. Weems* v. *Follette*, 414 F.2d 417 (2d Cir. 1969), cert. denied, 397 U.S. 950 (1970). But, as correctly noted by Judge Frankel, such discretion in this case is properly not ours to exercise but rather the Supreme Court's.[10] Accordingly, except for the issues considered in Part II, infra, we do not pass upon the merits of appellant's constitutional arguments. In light of the substantiality of some of those contentions, we are comforted in the thought that if our deference to the prior Supreme Court ruling in this case is undue, that tribunal—to which appellants may obviously apply—is the proper forum to so decide.

II.

Of course, we are not similarly foreclosed from considering the questions which could properly have been raised only by petition for a writ of certiorari. *Brown* v. *Allen*, 344 U.S. 443, 497 (1953) (separate concurrence by Mr. Justice Frankfurter). And to those issues we now turn.

Epton's first and most substantial argument is that his conviction for conspiracy to riot violated his rights under the first amendment because the overt acts alleged in the indictment were all constitutionally protected speech and, even if some were unprotected, because the trial judge did not instruct the jury that they could only convict as to those. On the first phase of this argument the district court ruled that the overt acts central to the State's case were outside the sphere of the first amendment. The court

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10 This result might be different if we reversed Epton's conviction on the conspiracy to riot count. But, as explained in Part II, *infra*, we affirm Judge Frankel's opinion as to that issue also.

reasoned that in the context of the 1964 Harlem riots "talk of terror, killing and warfare was 'advocacy of the use of force or of law violation . . . directed to inciting or producing imminent lawless action . . . and likely to incite or produce such action.'" 318 F. Supp. at 909, quoting *Brandenburg* v. *Ohio,* 395 U.S. 444, 447 (1968).

Judge Frankel also concluded that it was not constitutional error for the trial judge to fail to caution the jury against convicting solely on constitutionally protected overt acts because petitioner did not claim that such a request was made. Nor had he made that claim in his brief to the New York Court of Appeals or in his petition for a writ of certiorari or his jurisdictional statement. In addition, the district court believed that the jury would not have convicted Epton "unless it had focussed precisely on the . . . evidence of unprotected overt acts." 318 F. Supp. at 909.

Petitioner does not argue here that he made a specific request for a limiting instruction as to the conspiracy to riot count. Rather he claims that the issue was preserved by his general objection that the entire prosecution violated his first amendment rights and by his specific objection to the trial judge's reinstruction of the jury after they had requested additional instruction on other counts, those that charged criminal anarchy and conspiracy to advocate criminal anarchy.[11] Whether or not this oblique objection preserved petitioner's claim, we agree with the district court's ultimate conclusions on these issues.

The argument that all the overt acts were constitutionally protected speech simply ignores substantial portions of the evidence. Among the acts alleged to be in further-

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11 Of the 25 overt acts alleged in this count, 15 were identical to the overt acts alleged under the conspiracy to riot count.

ance of the conspiracy to riot were that Epton "discussed starting disturbances in Brooklyn," that Epton "discussed the use of Molotov cocktails," and that he made a speech in which he "discussed the killing of cops and judges." There was evidence to support a jury finding that each of these overt acts had in fact occurred, and we do not see why they are necessarily constitutionally protected in the sense appellant puts to us. If the position is taken that any speech is so protected, merely because words have been spoken to communicate ideas, the position is wrong. Clearly a charge of conspiring to violate the narcotics laws could be proved by evidence that one of the overt acts was a "discussion" among the conspirators. Cf. *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990, 996-97 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970). If the point is that Epton's words were publicly proclaimed to further a political view and were therefore protected, the answer is that this is an inaccurate description of the first two examples given above, which were private conversations. It is true that the third overt act occurred in a speech in which Epton did tell an audience in this tense period:

> They [the cops] declared war on us and we should declare war on them and every time they kill one of us damn it, we'll kill one of them and we should start thinking that way right now . . . because we had better stop talking about violence as a dirty word . . . .

We have great difficulty with the view that it is improper to use this language as proof of an overt act in furtherance of a conspiracy to riot.[12]

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12 In his opinion concurring in the dismissal of Epton's prior appeal to the Supreme Court, Justice Stewart noted:

(*footnote continued on next page*)

Moreover, it must be remembered that Epton was convicted of conspiracy in this case, the essence of which is an agreement to do an unlawful act, the crime of riot. Under New York law, the State need only prove the agreement and one overt act in furtherance of the agreement. Former N. Y. Pen. Law §§580, 583.[13] In *Yates* v. *United States,* 354 U.S. 298 (1957), the only overt acts proved at trial were constitutionally protected speech, two public meetings. Nevertheless, the Court held that on retrial these would be sufficient overt acts and stated, 354 U.S. at 334:

> It is not necessary that an overt act be the substantive crime charged in the indictment as the object of the conspiracy. . . . Nor, indeed, need such an act, taken by itself, even be criminal in character. The function of the overt act in a conspiracy prosecution is simply to manifest "that the conspiracy is at work," *Carlson* v. *United States,* 187 F.2d 366, 370 [(10th Cir. 1951)], and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence. [Other citations omitted.]

Under this reasoning, it is not the "speech" that is made criminal, but rather the agreement, and whether the overt

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> But the State in these cases presented proof that Epton had actively participated in the formation of a group dedicated to armed revolt against the police under the direction of "block captains" and with the assistance of "terrorist bands," equipped with Molotov cocktails that Epton himself had explained how to use. In the context of this record, activities such as these can make no serious claim to constitutional protection.
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> 390 U.S. at 29-30 n. †.

13 Present New York law is similar. See N.Y. Pen. Law §§105.00-105.20.

act is constitutionally protected speech would be irrelevant. We recognize that the question is a substantial one. Justices Black and Douglas dissented on this issue in *Yates*. In Epton's prior appeal to the Supreme Court, Justice Douglas dissented from dismissal of Epton's appeal on the same ground, 390 U.S. at 33. And Justice Stewart, while concurring in the dismissal, agreed that:

> [I]t is at least arguable that a State cannot convict a man of criminal conspiracy without first demonstrating some constitutionally unprotected overt act in furtherance of the alleged unlawful agreement.

390 U.S. at 29-30 n. 1. But we do not think we should ignore what appears to be the meaning of the most relevant Supreme Court precedent. If *Yates* does not now govern this issue, it is for that court, rather than for an inferior federal court, to say so.

Petitioner's second argument is that an amendment to the same count of the indictment (conspiracy to riot) deprived him of due process under the fourteenth and fifth amendments. The indictment alleged that Epton conspired with others to "agree to participate in a riot" by "promoting . . . an assembly of more than three persons which disturbed the public peace." The amendment changed the last five words to "which would disturb the public peace." As noted above, the count charged Epton with conspiracy and he could have been convicted of that whether or not the substantive offense which was the object of the conspiracy was completed. Cf. *Pinkerton* v. *United States*, 328 U.S. 640 (1946). The amendment was a minor change of grammatical tense and clarified the issue for the jury. Cf. *United States* v. *Caine*, slip op. 2591 (2d Cir. Apr. 27, 1971). Even if the indictment had not been clarified, Epton

could properly have been convicted of conspiracy.[14] We agree with Judge Frankel that the action of the state judge was not constitutionally impermissible.

Appellant's last argument need not be discussed with particularity. He alleges that certain rulings of the trial court and actions of the prosecutor were prejudicial and deprived him of a fair trial. The issue before us is not whether error was committed, but whether these rulings, singly or together, rendered the trial so unfair as to deny appellant due process, thereby raising a federal constitutional question. See *Schaefer* v. *Leone,* slip op. 3133 (2d Cir. May 24, 1971); *United States ex rel. Cannon* v. *Maroney,* 373 F.2d 908 (3d Cir. 1967). We have considered appellant's argument and conclude that due process was not denied.

Accordingly, we affirm the district court's order denying Epton's petition for the writ of habeas corpus.

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14 Of course, well before this ruling was made, the substantive charge of riot against Epton had already been dismissed by the trial judge, thereby eliminating any confusion of the issue submitted to the jury on the conspiracy to riot count.

APPENDIX A-2

Opinion of Frankel, *D.J.* Re Bail

[Filed February 15, 1968]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM

68 Civ. 461

UNITED STATES OF AMERICA *ex rel.* WILLIAM EPTON,

Petitioner,

—against—

ALBERT NENNA, Warden,
Manhattan House of Detention for Men,

Respondent.

FRANKEL, *D.J.*

The petition for habeas corpus raises complex and difficult questions of due process in both the procedural and the substantive meanings of the constitutional phrase. To mention only the problem which has caused particular concern at the outset of this proceeding, there is a sweeping attack upon the composition of the grand jury which indicted petitioner, implicating both the adequacy of the governing state statutes on their face and the application of the statutes in the circumstances of this case. There are, in

addition, questions under the First Amendment (as it applies to the States through the Fourteenth) which led one Justice of the Supreme Court to file a dissent from the denial of certiorari (and dismissal of an appeal) and another to note the limited grounds of his concurrence in that disposition. *Epton* v. *New York,* Nos. 502 and 771 Misc., Jan. 22, 1968, 36 U.S.L.W. 3296 (Douglas, *J.,* dissenting, and Stewart, *J.,* concurring).

With the filing of the present habeas application, petitioner applied for release on bail by this court pending decision as to whether the writ should finally issue. While the question may not be wholly free from doubt, the court concludes that there is power to grant such interim relief. See, e.g., *Johnston* v. *Marsh,* 227 F.2d 528 (3d Cir. 1955); *Application of Stocker,* 271 F. Supp. 406, 407-8 (D. N.J. 1966), *aff'd,* 381 F.2d 379 (3d Cir. 1967); *United States* v. *McCloskey,* 239 F. Supp. 419, 424 (S.D.N.Y.), *aff'd on other grounds,* 345 F.2d 305 (2d Cir. 1965), *rev'd on other grounds,* 383 U.S. 234 (1966); *United States* v. *Rundle,* 219 F. Supp. 549 (E.D. Pa. 1963), *aff'd,* 337 F.2d 269 (3d Cir. 1964). It is, however, a power that ought to be most sparingly exercised. Where the State has carried a prosecution to conviction and the verdict has been sustained through the appellate process, including denial of certiorari and dismissal of appeal by the Supreme Court, there are compelling interests on the side of proceeding to execute the criminal judgment. It should require a substantial showing of countervailing circumstances to override or postpone that objective.

Proceeding upon such premises, the court heard extensive argument and studied preliminarily the voluminous papers supporting the bail application. It appeared in

the end that this was one of the relatively rare cases in which relief of this kind should be granted. The factors leading to this conclusion are:

(1) The substantiality of the issues posed by the habeas petition.

(2) The inevitably long time it would require for the evidentiary hearing and study necessary to resolve at least the grand jury issue.

(3) The fact that petitioner, having served three months before he was released on bail pending his state appeal, will probably complete his sentence within the next five months or so.

(4) The fact, just mentioned, that petitioner actually served three months during the state appellate process, whereas the eventual ruling of the trial judge, certifying the existence of "reasonable doubt," represented a mature judgment that this period of incarceration should ideally have been avoided.

(5) The undisputed judgment, reflected in the comments of Mr. Justice Harlan granting bail pending disposition of the petition for certiorari, that petitioner presents no substantial danger of absconding while he is free on bail.

The conclusion that this was a proper case for the granting of bail, conveyed to counsel during a second oral hearing, tended in practical effect to intestify some difficult and delicate procedural problems in the case. Initially at least, there was doubt and some ambiguity as to respondent's stance with respect to the grand jury questions. It was arguable (but, in this court's tentative judgment, not ten-

ably) that petitioner had "waived" his attacks upon the indictment which raised such questions. Whether or not there had been a waiver, it was clear that these matters had never been fully explored in the state proceedings. And this in turn stirred inquiries as to whether there was an adequate and appropriate remedy yet to be exhausted in the state courts.

It became evident, for reasons that require no elaboration at this time, that there were cogent arguments against merely sending the petitioner elsewhere in pursuit of a problematical possibility of a state remedy. It was equally evident, however, that the most insistent claims of comity would make it preferable to have the courts of New York rather than the federal district court canvass the grand jury problem in the first instance. Cf. *Chestnut* v. *People of State of New York,* 370 F.2d 1, 6-8 (2d Cir. 1966), *cert. denied,* 386 U.S. 1009 (1967). That course was plainly to be preferred if it could be pursued without undue sacrifice of petitioner's personal rights.

The considerations thus briefly outlined were explored at length in frank and helpful discussions with counsel. Confronting this court's preliminary estimates that (1) there should be bail and (2) the grand jury problem, as well as the others, required plenary consideration, the District Attorney's able representative has now joined with petitioner's counsel in the following statement of position and program of action:

(1) Petitioner's contentions regarding the grand jury —affecting the statutes on their face and as applied —are open for hearing on the merits in a state *coram nobis* proceeding.

(2) In addition to acknowledging such jurisdiction, the respondent will acknowledge and concede that petitioner's release on bail should be permitted by the state court pending completion of the state remedial process.

(3) The state court hearing will proceed upon the basis of the record already made in *People* v. *Otis Chestnut* N.Y. Crim. Ct. No. B-2430/1965, now pending on appeal to the Appellate Term, plus such supplementary evidence as the *coram nobis* court may deem material and relevant.

(4) Counsel for both sides will cooperate to effect the fair and expeditious presentation of the foregoing matters to the State Court.

(5) While such steps are being taken, this court will hold in abeyance the pending habeas petition.

The foregoing outline is meant to record where we are and to reflect such judgments of fairness and propriety as the court, grateful for the skilled and professional assistance of counsel, has been able to achieve with the relative speed that the circumstances seemed to dictate. If and when further proceedings are required here, they may be commenced on two days' notice.

Dated: New York, New York
February 15, 1968

MARVIN E. FRANKEL
U.S.D.J.

Opinion of Frankel, *D.J.* Denying Petition

[Filed October 5, 1970]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OPINION

68 Civ. 461

UNITED STATES OF AMERICA *ex rel.* WILLIAM EPTON,

Petitioner,

—against—

ALBERT NENNA, Warden,
Manhattan House of Detention for Men,

Respondent.

Appearances:

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FRANKEL, *D.J.*

This habeas corpus proceeding comes on for decision after a long, unusual and, possibly, edifying procedural history.

The petitioner was indicted by a New York grand jury on June 7, 1965, upon charges of riot (former N. Y. Penal Law, §2090), conspiracy to commit riot (former N. Y. Penal Law, §§2990, 580), criminal anarchy (former N. Y. Penal Law, §§160, 161), and conspiracy to commit criminal anarchy (former N. Y. Penal Law, §§160, 161, 580). The first of these charges was dismissed for lack of evidence by the trial judge. Petitioner was found guilty by the jury on the rest, and sentenced to one year on each count, the sentences to be served concurrently.

Appeals through the New York courts resulted in affirmances. 19 N.Y.2d 496 (1967), aff'g 27 A.D.2d 645 (1966). Epton petitioned for a writ of certiorari and appealed, urging, *inter alia*, the unconstitutionality of New York's criminal anarchy statute.[1] On January 22, 1968, certiorari was denied and the appeal was dismissed for want of a substantial federal question. 390 U.S. 29, rehearing denied, 390 U.S. 976 (1968), petition for leave to file a petition for rehearing out of time denied, 38 U.S.L.W. 3479 (June 1, 1970). Two Justices wrote brief opinions on this disposition, one dissenting, one explaining the grounds for his concurrence, and these are factors of some interest now, as will be discussed below.

On February 5, 1968, after serving some three months of his one-year sentence, petitioner brought the present

[1] In his petition for certiorari, at 16n., Epton explained that he was proceeding by way of certiorari as well as appeal because of the wording of Mr. Justice Harlan's order continuing bail "pending the timely filing and disposition of a petition for certiorari."

application for habeas. He presented again the several constitutional claims that had been before the Supreme Court. In addition, he attacked the composition of the grand jury that had indicted him, pointing out that the facts underlying this contention had never been heard in the state courts. It was evident that at least the last of these arguments presented a problem of substance, probably requiring some considerable time for its resolution. See *Chestnut* v. *People of the State of New York,* 370 F.2d 1, 6-8 (2d Cir. 1966), cert. denied 386 U.S. 1009 (1967). It seemed evident, moreover, that full consideration of this subject could probably not be accomplished before most or all of petitioner's sentence had been served. Furthermore, it was agreed that the proper place for at least the initial consideration of this matter was the state rather than the federal court. See *id.* at 6.

Reasoning together upon these considerations, counsel and the court agreed that the matter should properly go before a state tribunal for decision upon the merits; that suitable procedures were available for such handling; and that the State ought, with the consent of the prosecutor, to release petitioner on bail pending the determination of his claims. This court concluded that it would hold the petition pending such steps in the state court. Then, with what proved to be premature enthusiasm, this court recorded the history of what was then thought to be an instance of effective and agreeable comity. *United States ex rel. Epton* v. *Nenna,* 281 F. Supp. 388 (1968).

On Friday, February 16, 1968, the petitioner appeared with counsel in the Supreme Court of New York County to institute a coram nobis proceeding and have himself released on bail. This court is informed that the State Judge on that morning announced his willingness to permit the

release on bail, instructing counsel for petitioner to proceed with the procurement of a bondsman and the accomplishment of other necessary details. On the afternoon of the same day, for reasons which have never been spread upon any record known to this court, the state tribunal revoked its determination of the morning and announced that bail would not be allowed. In these circumstances, this court ordered petitioner's release the following morning on bail of $25,000 pending completion of his state coram nobis proceedings. He has been free on this order ever since.

The parties then went forward with petitioner's state post-conviction proceeding. It was agreed that Epton's claim concerning the composition of the grand jury would be determined substantially on the basis of a record already made in *People* v. *Chestnut et al.*, where a pre-trial motion challenging New York's method of selecting grand jurors had been denied after a hearing.[2] N.Y.L.J., April 5, 1967, p. 18, c. 6. On June 4, 1970, the Court of Appeals for the State of New York affirmed, as modified, the *Chestnut* convictions, including the grand jury ruling, 26 N.Y.2d 481 (1970). Accordingly, the Supreme Court of New York County denied Epton's coram nobis petition on June 18, 1970.

Returning here, where the habeas petition had been held in abeyance, the parties filed extensive briefs and were heard orally. The application for federal relief is finally ready for decision. It must be denied.

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[2] Prior to the state hearing and trial, the *Chestnut* defendants brought a removal action in this court under 28 U.S.C. §1443(1), challenging the grand jury selection system on constitutional grounds. The Court of Appeals affirmed an order of remand. *Chestnut* v. *People of State of New York*, 370 F.2d 1 (1966), cert. denied, 386 U.S. 1009 (1967).

I.

Petitioner's main point here, as has been noted, is his attack upon the composition of the grand jury that indicted him. His arguments are not without substance. See *Chestnut* v. *People of State of New York,* 370 F.2d 1, 7 (2nd Cir. 1966).[3] They have been rejected, however, by a large and unanimous array of New York State Judges. While that, in the nature of the habeas jurisdiction, does not bind a single federal judge at *nisi prius,* it is of interest. At any rate, this court reaches the conclusion that the state judgment must be sustained.

On its face at least, the most serious claim in this regard is that the court should infer a pattern of unconstitutional discrimination from the low representation of black people and Puerto Ricans on the New York County grand jury. It is not necessary to labor the point that in our constitutional scheme invidious racial classifications are fundamentally and uniformly intolerable. Recognizing that, the court concludes nevertheless that petitioner fails in this branch of his argument. There is no showing of purposeful or intentional discrimination against any racial or ethnic group. The facts and the governing legal principles are amply reviewed in the opinion of Chief Judge Fuld for his unanimous Court of Appeals. See also *United States* v. *Bennett,* 409 F.2d 889, 892, aff'g *United States* v. *Bennetti,* 291 F. Supp. 461 (1968); *United States* v. *Flynn,* 216 F.2d 354, 378-89 (2nd Cir. 1954), cert. denied, 348 U.S. 909 (1955); *United States* v. *Greenberg,* 200 F. Supp. 382, 386-87 (S.D.N.Y. 1961); *United States* v. *Bowe,* 360 F.2d 1, 7, cert. denied, 385 U.S. 961 (1966); Cf. *United States ex*

[3] As indicated above, Epton's grand jury challenge has proceeded on the basis of a hearing record prepared in *People* v. *Chestnut et al.*

rel. Torres v. *Mancusi*, 427 F.2d 168 (2nd Cir. 1970); *United States ex rel. Fein* v. *Deegan*, 410 F.2d 13, 22 (2nd Cir. 1969). Recognizing that the statistics alone comprise evidence that might (with other evidence) help to prove purposeful discrimination on forbidden grounds, see, e.g., *Turner* v. *Fouche*, 396 U.S. 346 (1970), this court finds no ground for rejecting the reasoned views on this subject of the State Court of Appeals.

Related to the argument about racial discrimination is petitioner's claim that the New York system of grand jury selection is infirm because of its voluntary nature. It is accepted for this purpose—indeed, it is hardly doubtful—that the racial disparaties result at least in part from this factor. Petitioner's argument fails none the less. It is not shown that the system of volunteers was designed or has been administered as "an exclusionary device * * *." *Hoyt* v. *Florida*, 368 U.S. 57, 61 (1961). The State's Legislature could rationally have concluded that volunteers for the solemn responsibilities of grand jurors would be more reliable, devoted and effective than compelled members. There is no ground in reason or authority for holding that coercion is a constitutional requirement in this area any more than it is in connection with voting—though we may readily accept that some defendants, like some candidates, might fare better if higher proportions of certain groups were produced by a compulsory system than by a system of choice.[4] At least on the record here, New York's volunteer system is no more vulnerable than the selectively voluntary system upheld in *Hoyt* v. *Florida*, *supra*.

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[4] Whatever strictures we hear these days about "permissiveness," there is no question in our courts that our prima facie preference is for freedom as a principle of government.

On another front, while the governing state statute, New York Judiciary Law § 596(2), makes people aged 21 to 70 eligible for service, it is undisputed that at the time in question those administering the law excluded persons younger than 35 or over 65. Petitioner attacks the exclusions of those below 35. This court need not (and does not) applaud the wisdom of this exclusion to sustain its constitutionality.[5] It is pertinent here, as elsewhere on this subject, that the State (1) is not required to proceed by grand jury indictment at all, *Hurtado* v. *California,* 110 U.S. 516 (1884); *Beck* v. *Washington,* 369 U.S. 541, 545 (1962), and (2) may assign the decision to prosecute to highly selected and specially qualified people—e.g., law-trained prosecutors. *Lem Woon* v. *Oregon,* 229 U.S. 586 (1913); *Gaines* v. *Washington,* 277 U.S. 81, 86 (1928); *Beck* v. *Washington,* 369 U.S. 541, 545 (1962). This does not mean, of course, that the State, in making up grand juries or otherwise, may employ arbitrary, irrational or otherwise lawless discriminations. It does suggest, however, that the latitude for judgment by the State is broader than petitioner would have it.

On the specific subject of age, the State justifies the minimum age of 35 or the grounds that grand jurors ought to have had petit jury experience, and that the powers of grand juries are broad, potentially drastic and relatively unfettered, requiring people of mature years and other qualities that give promise of stability. Reason-

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[5] There is no question in this court, of course, as to the validity of the exclusion under state law. As to that, petitioner's claims have been rejected by the State's highest Court. The case comes here, then, as if a lower age limit of 35 were written into the statute. *Murdock* v. *Memphis,* 87 U.S. (20 Wall.) 590 (1875); *Amer. Ry. Express Co.* v. *Kentucky,* 273 U.S. 269 (1927); *Scripto* v. *Carson,* 362 U.S. 207, 210 (1960).

able people could differ about this judgment, just as they might about the prescription in the Constitution of minimum age requirements for high federal office—35 for the Presidency (Art. II, § 1), 30 for the Senate (Art. I, § 3), 25 for the House of Representatives (Art. I, § 2). Without pursuing strained comparisons between the White House and the grand jury room, we note that age qualifications have been included among an array of others deemed permissible as criteria for both grand and petit jury service. See *Carter* v. *Jury Commission,* 396 U.S. 320, 332-33 (1970).

Coming to what is for this court the most difficult issue of all, though it appeared to be of only passing concern for the State Court of Appeals, we note the undisputed fact that welfare recipients were excluded from New York County grand juries at the time here in question. If they do not share the almost inexorable condemnation visited upon racial classifications, invidious distinctions in terms of wealth or poverty are not in markedly greater favor. *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966); *Turner* v. *Fouche,* 396 U.S. 346, 361-64 (1970); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). It would be difficult today to justify as an ongoing practice the discrimination against both welfare recipients themselves and at least many defendants entailed in the kind of exclusion here assailed. Acknowledging grave doubts, however, this court concludes that the point cannot prevail in the particular circumstances of its presentation here.

First of all, the record before us does not demonstrate, but tends to dispel, any showing of discrimination against poor people as such. The New York Judiciary Law, § 598, disqualifies for jury service not only broad categories of

elected and appointed officials in high office, but any state or federal "employee * * * receiving annual compensation in excess of one thousand dollars from [government] * * * sources * * *." Whether or not this is wise or essential, rational people could surely entertain the broad underlying premise that those dependent upon government for substantial income might be unsuitably conflicted if they served as jurors.[6] And the evidence here indicates that it was this rather than an animus against poor people that led to the administrative practice now in question. As Chief Judge Fuld observed, this view held by the responsible officials "may have been erroneous," but that does not in itself pose a problem of federal constitutional law (see note 5, *supra*).

The New York Court of Appeals not only cast doubt under state law upon the exclusion of people on welfare; it also made its decision on the understanding that the practice "has since been discontinued." There has been some quarrel here about the correctness of that understanding. If it were necessary to resolve this incidental difference, this court would find no sufficient basis for rejecting what Chief Judge Fuld stated as the fact. More importantly, however, we are entitled to assume that the recorded understanding of the State's highest Court, promoted there and reaffirmed here by the State's legal officers, represents the reality upon which all may confidently rely from now on. Thus, although the defect is not retroactively cured for Epton's case in any event, but hav-

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[6] Compare the cases in which defendants, though unsuccessfully, have urged such grounds in challenges for cause. E.g., *Dennis* v. *United States*, 339 U.S. 162 (1950); *Frazier* v. *United States*, 335 U.S. 497 (1948); *Kempe* v. *United States*, 160 F.2d 406, cert. denied, 331 U.S. 843 (1947).

ing in mind, too, that he has shown no concrete prejudice to himself on this account, we find the State's position buttressed by the fact that there is no prospective good to be served by invalidating the conviction. See *Bennett* v. *United States*, 409 F.2d 388, 892-93; *United States ex rel. Fein* v. *Deegan*, 410 F.2d 13, 22 (2nd Cir. 1969); *United States ex rel. Torres* v. *Mancusi*, 427 F.2d 168, 169 (2d Cir. 1970); *United States* v. *Ballard*, 329 U.S. 187, 206 (1946) (Frankfurter, *J.*, concurring).

Finally, a similar but less important point is made of the fact that the law of New York at the time in question contained a dubious requirement, see *Samuels* v. *Mackell*, 288 F. Supp. 348, 356 (S.D.N.Y.) (Friendly, *J.*, for 3-judge court), prob. juris. noted, 393 U.S. 975 (1968), that a person have property worth $250 in order to be eligible for jury service. The record here shows that this provision was not enforced in 1964, when Epton was indicted, and it has since been deleted from New York Judiciary Law § 596. There is some evidence that it was enforced as late as 1960, and it is argued that the normal replacement rate was such that grand juries four years later would still have reflected the questionable criterion. But the point dwindles with this to a speculative and attenuated proposition that cannot be deemed a substantial reason for nullifying petitioner's indictment and subsequent conviction by a petit jury the composition of which is not assailed. See *United States* v. *Leonetti*, 291 F. Supp. 461, 476 (S.D.N.Y. 1968); *United States* v. *Dennis*, 183 F.2d 201, 217-18 (2nd Cir. 1950); *United States* v. *Van Allen*, 208 F. Supp. 331, 336 (S.D.N.Y. 1962).

We conclude, in sum, that petitioner's arguments about the character of the grand jury are—singly in some in-

stances, and certainly in cumulation—scarcely insubstantial. On balance, however, and if not with certainty, this court finds them insufficient to invalidate his state conviction.

II.

In addition to his attack on the grand jury, petitioner urges a number of other grounds for voiding his conviction. For the most part these arguments are the same as those he took to the Supreme Court in his appeal and petition for writ of certiorari. The Supreme Court, as noted above, dismissed the appeal without opinion "for want of a substantial federal question" and denied certiorari. 390 U.S. 29 (1968). There were, however, short opinions by two Justices. Concurring in the Court's disposition, Mr. Justice Stewart stated that he thought the conspiracy to riot conviction should stand, and that under the concurrent sentence doctrine there was no reason to consider the other convictions for which concurrent sentences had been ordered. *Id.* Mr. Justice Douglas, finding all three convictions vulnerable, dissented. *Id.* at 30. Two petitions for rehearing, including one filed this year (more precisely, a motion for leave to file a petition for rehearing out of time), were denied. 390 U.S. 976 (1968); 38 U.S.L.W. 3479 (June 1, 1970).

Petitioner invites us to reconsider all the issues that were before the Supreme Court in 1968. The proposal is too broad. Whatever the Supreme Court has already decided in the case is the law of the case, and binds us. See, e.g., *Ex parte Sibbald* v. *United States,* 37 U.S. (12 Pet.) 488, 492 (1838); *Banco Nacional de Cuba* v. *Farr,* 383 F.2d 166, 177-78 (2nd Cir. 1967); *Munro* v. *Post,* 102 F.2d 686, 688 (2nd Cir. 1939); 1B Moore, Federal Prac-

tice ¶ 0.404[10]. The law of the case applies to what was decided "either expressly or by necessary implication." 1B Moore, *supra; Munro* v. *Post, supra,* 102 F.2d at 688.

Applying these principles, this court finds foreclosed here the serious questions petitioner renews about the constitutionality of New York's former criminal anarchy law, N.Y. Penal Law §§ 160, 161,[7] but deems it necessary to consider other, lesser arguments that were not resolved in the highest Court "by necessary implication." As to the area foreclosed, our analysis runs like this: the attack petitioner brought to the Supreme Court upon the state anarchy statute was the proper and sufficient basis for his being before that Court by appeal rather than certiorari, 28 U.S.C. § 1257(2). The majority, without opinion, dismissed the appeal "for want of a substantial federal question." That was, for the purposes of the appealable question, a disposition "on the merits" sufficient to conclude the subject for this court.[8] The phrase "on

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[7] The problem is again before the Supreme Court, in *Samuels* v. *Mackell, supra.*

[8] There is lively disagreement among respected constitutional scholars concerning the significance of the Supreme Court's dismissal of an appeal. Some argue that since Congress has obliged the Court to hear certain appeals, 28 U.S.C. §1257, the dismissal of such appeals must be viewed as decisions on the merits. See Wechsler, Toward Neutral Principles of Constitutional Law, in Wechsler, Principles, Politics and Fundamental Law 3, 13-15, 47 (1961); Gunther, The Subtle Vices of the 'Passive Virtues,' 64 Col. L. Rev. 1, 10-13 (1964); Hart & Wechsler, The Federal Courts and the Federal System 574-76 (1953), Hart, Forward: The Time Chart of the Justices, 73 Harv. L. R. 84, 89 n. 13 (1959). Others, portraying and justifying a more politically "flexible" Court, have tried to demonstrate that appeals are often "dismissals for want of a convenient, or timely, or suitably presented question" for resolution by the country's highest Court. Bickel, The Least Dangerous Branch 126-127. See also, *id.* at 71; 132, 278 n. 25 & 26; Deutsch, Neutrality, Legitimacy, and the Supreme Court, 20 Stan. L. R. 169, 198-206, 213-249 (1968);

the merits" is in quotation marks here to flag its ambiguity, but either of its possible meanings in context leads to the same result for us at the present juncture:

(1) The Supreme Court, though we are entitled to find this improbable, may have considered the substantive issues attending the anarchy statute and decided them summarily against petitioner. That would be the most obvious bar to reconsideration here.

(2) Some or all of the other Justices in the majority may have gone on the concurrent sentence doctrine announced by Mr. Justice Stewart as the basis for his vote. The result for us of this remaining logical possibility is less obvious, but in the end not different.

Elaborating the latter proposition, this court would deem itself clearly bound by a decision of the Supreme Court that other, adequate grounds immunize the state conviction against reversal without reaching the constitutional claims concerning the anarchy law. Accordingly, as things stood on January 22, 1968, when the appeal was dismissed, this court was barred from considering those claims because the Supreme Court had either decided them ~~or~~ held they should not be reached. See *Samuels* v. *Mackell, supra,* 288 F. Supp. at 354 n. 6.

M. Shapiro, Law and Politics in the Supreme Court (1964). The latter view, if accepted, might suggest that a district court could hear on habeas issues the Supreme Court has dismissed on direct appeal, just as it hears those raised in certiorari petitions which are denied.

For the time being, at least, the debate must be among scholars. Until the Supreme Court explicitly tells us otherwise, the lower courts must assume that the obligatory jurisdiction, a matter given to Congress to control, is being exercised in accordance with what appears to be the literal statutory mandate.

Petitioner argues that after its dismissal of the appeal, the Supreme Court overruled the concurrent sentence doctrine in *Benton* v. *Maryland,* 395 U.S. 784 (1969). Assuming this to be so, it makes no difference. This court is bound by the principles stated in *Gaines* v. *Rugg,* 148 U.S. 228, 244 (1893):

> "As to the suggestion that the views adopted by this court in [a case] * * * decided * * * after the present cases were decided, would, if applied to the present cases, have caused a different result in them, we are of the opinion that, without conceding that such would have been the result, this court cannot, on well-established rules and principles, permit the Circuit Court, of its own motion, to go back of, or subvert, what was settled by the opinion and mandate in the present cases."

See also *Ex parte Sibbald* v. *United States, supra; Banco Nacional de Cuba* v. *Farr, supra,* 383 F.2d at 177-78.

Furthermore, it is far from clear that the rule relating to concurrent sentences was ended utterly by *Benton.* What the case seems ultimately to hold is that where adverse collateral consequences may follow from a questioned sentence, the fact that it runs concurrently with a valid sentence is "no jurisdictional bar" (395 U.S. at 791) to considering the disputed one. The case does not eliminate the doctrine "as a rule of convenience" (*id.* at 791):

> "It may be that in certain circumstances a federal appellate court, as a matter of discretion, might decide * * * that it is 'unnecessary' to consider all the allegations made by a particular party. The concurrent sentence rule may have some continuing validity as

> a rule of judicial convenience. That is not a subject we must canvass today, however."

Subsequent decisions reveal, authoritatively for this court, the continued vitality of the "discretion" thus preserved. *United States* v. *Febre,* No. 33241 (2nd Cir., Jan. 8, 1970); *United States ex rel. Weems* v. *Follette,* 414 F.2d 417 (2nd Cir. 1969); *Kauffmann* v. *United States,* 414 F.2d 1022 (8th Cir. 1969); *United States* v. *Barsaloux,* 419 F.2d 1299 (5th Cir. 1969), cert. denied 90 S. Ct. 1087 (1970).

If it is discretionary whether the concurrent sentence doctrine will apply despite the disposition by the Supreme Court almost three years ago, the appeal must lie to the discretion of that Court, not this one.

The case stands differently for the questions Epton raised in the Supreme Court which were not appealable as of right but permissible points for certiorari. It is familiar that the denial of certiorari is not to be viewed as an "expression of opinion on the merits" and that questions rejected by denials of certiorari on the direct appeal route are open later in habeas. *Brown* v. *Allen,* 344 U.S. 443, 497 (1953) (Frankfurter, *J.*); see also 1B Moore, *supra* at ¶ 0.404[5]; 1A Moore, *supra* at ¶ 0.230 [2]. The details of this proposition could be further proliferated, but they are not momentous. This court is satisfied that on at least the first of the two subjects hereinafter discussed, petitioner is entitled to a ruling in this proceeding. Still others will not be discussed here though they have been considered.

A. For his first point after the ones concerning the anarchy statute, petitioner argues that his right to due process was violated when at the close of the evidence

the trial judge amended the conspiracy-to-riot count so that instead of charging a conspiracy to promote

> "an assembly of more than three persons *which disturbed* the public peace,"

it charged a conspiracy to promote

> "an assembly of more than three persons which *would disturb* the public peace * * *." (Emphasis added in both versions.)

Petitioner shows no prejudice from this revision. Cf. *Russell* v. *United States,* 369 U.S. 749, 763 (1961). His claim that it violated the Fourteenth Amendment is not meritorious.

Obviously if the change altered in some meaningful way the one against which petitioner had been summoned to defend, his point would be significant. But it is equally obvious that no such unfairness occurred. The accusation in the count in question was one of *conspiracy* to riot; the substantive offense of rioting was separately charged in a separate count. Thus, petitioner had ample notice that he was accused of the substantive crime and, in addition, of the conspiracy to commit it, which would, of course, be complete whether or not the substantive goal was ever attained. *Pinkerton* v. *United States,* 328 U.S. 640 (1946); *United States* v. *Rabinowich,* 238 U.S. 78 (1915); *People* v. *Tavormina,* 257 N.Y. 84 (1931). All the judge's verbal change did was to make somewhat clearer this elementary distinction.

B. Petitioner's next argument—and the only other one requiring moderately detailed treatment here—is somewhat more troublesome. He urges that his conviction for

conspiracy to riot must be voided because activities protected by the First Amendment were the only overt acts charged and proved under this count.

To begin with, petitioner misstates the facts. As was noted when the case was in the Supreme Court, the evidence in question included evidence of conduct outside the sphere of the First Amendment. See 390 U.S. at 29-30 fn. (Stewart, *J.*, concurring); *id.* at 33 n. 2 (Douglas, *J.*, dissenting). Not only was there such "unprotected" evidence; it was evidently central to the prosecution's case in terms of emphasis and potential impact on the jury. It included, for example, evidence of Epton's guidance to an assemblage on "suckering" policemen onto side streets to kill them; his instructions on manufacture and use of weapons for street warfare; his planning of demonstrations and other events, not to convey ideas, but as occasions and techniques for the fomenting of physical violence. These were the kinds of things—evidence of efforts to promote "guerilla warfare," "terrorism," "killing"—that were relied upon in page after page of the prosecution's summation, the whole thrust of which was to dispel the claim that Epton had been engaged in peaceful persuasion and to show instead that "the important evidence" (Tr. 1803) demonstrated Epton's purpose directly and immediately to get people in Harlem to "start rioting, continue to riot, and * * * keep the situation fired up." (Tr. 1813). These are the realistically major and critical materials on which the New York Court of Appeals, unanimous in this respect, found the evidence, including words, to establish a "'clear and present danger' of riot." 19 N.Y.2d at 507.[9] And it seems evident from the character

[9] In his brief to the New York Court of Appeals (p. 69), petitioner insisted that the question of "clear and present danger" is one "for the court alone," and that the trial judge had erred in giving it to the jury.

of the evidence and the arguments about it that the jury would not have convicted unless it had rejected petitioner's testimony that his violent language was figurative and had accepted the prosecutor's thesis that the talk of terror, killing and warfare was "advocacy of the use of force or of law violation * * * directed to inciting or producing imminent lawless action and * * * likely to incite or produce such action." *Brandenburg* v. *Ohio,* 395 U.S. 444, 447 (1968).

In this setting, building upon the dissent of Mr. Justice Douglas, 390 U.S. at 34 n. 2, petitioner argues that the conviction must be nullified because the trial judge did not caution the jury against convicting solely on "constitutionally protected" overt acts. This court notes, however, that:

(1) there is no claim that any such limiting instruction was ever requested;

(2) petitioner never claimed error in the failure to give such an instruction in his brief to the New York Court of Appeals, his petition for certiorari or his jurisdictional statement;

(3) the absence of a request or argument on direct appeal is perfectly understandable since it seems plain that the jury, as a matter of fact, would not have convicted unless it had focussed precisely on the steadily emphasized evidence of unprotected overt acts.

It is not possible, of course, to be mathematically certain that the jury did not convict solely upon one of the "protected" overt acts. But this is true in most con-

spiracy cases, where the list of overt acts commonly includes many things, innocent in themselves, comprised of speech—meetings, conversations, communications. It has not followed that limiting instructions of the type petitioner now claims as essential must be given routinely.

Beyond that, this court finds solid conviction in the record here that the point so tardily urged is an empty abstraction. The possibility against which an instruction is now demanded was not a real one in terms of the evidence, the argument and the instructions before the jury.

C. A number of other issues are tendered with respect to various rulings of the state trial court and conduct of the prosecutor. They have been studied. The court concludes that they do not, individually or collectively, constitute a basis for federal habeas corpus.

III.

Petitioner has been on bail for almost three years while the State Courts considered the grand jury problem left for them on grounds of comity. There has never been any question that the problem was one of substance. Nevertheless, but for our bail order, Epton would have served his sentence long before the State had completed its proceedings. Cf. *Green* v. *City of Orlando,* 313 F. Supp. 583, 584 (M.D. Fla. 1970). Despite this court's conclusions today, there remains an authoritative pronouncement that his claims have substance. See *Chestnut* v. *People of State of New York, supra,* 370 F.2d at 6-7. The reasons underlying this court's order releasing petitioner on bail seem effective still for the period necessary for him to prosecute an expeditious appeal. Accordingly, that order remains effective, and this court, to minimize delay, now

issues its certificate of probable cause under F.R.A.P. 22(b).[10]

To conclude, then, for the reasons reviewed above, the petition is denied.

It is so ordered.

MARVIN E. FRANKEL
U.S.D.J.

Dated: New York, New York
October 5, 1970

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[10] The continuance of bail herein would not be ordered, of course, if it were thought inconsistent with Judge Anderson's order of July 31, 1970, sustained by a three-judge bench on September 18, 1970 (*United States ex rel. Chestnut* v. *Criminal Court,* No. 35209, 2d Cir.), staying the district court's order granting bail to Chestnut and his co-petitioners.

There, the conviction being for contempt of the grand jury, not for a crime charged by the grand jury, Judge Anderson stressed that "petitioners [were] not accused, indicted by an unconstitutionally selected grand jury but [were] witnesses called to testify before a grand jury instituted, by the regular procedures of the State of New York, who were granted immunity and later held in contempt by the court for nonetheless refusing to testify. That there may have been some invalidity, even of constitutional dimensions in convening the jury is, in a case of this kind, completely irrelevant. Their affront was to the judicial system of the State and must be dealt with as is perjury in a prosecution based upon an unconstitutional criminal statute. See *United States* v. *Manfredonia,* 414 F.2d 765, 765, note 5 (2d Cir. 1969)." Memo. of Judge Anderson, Aug. 3, 1970, quoted in the *Chestnut* brief in this court.

APPENDIX A-3

Opinion of the Court of Appeals of May 16, 1967

SCILEPPI, *J.*:

The defendant, William Epton, has been found guilty on three counts of a four count indictment. After a trial with a jury in the Supreme Court, New York County, he was convicted of conspiracy to riot (Penal Law, §§580, 2090), conspiracy to commit the crime of advocacy of criminal anarchy (Penal Law, §§160, 161, 580), and advocacy of criminal anarchy (Penal Law, §§160, 161). A fourth count, charging defendant with the substantive crime of riot, was dismissed by the trial court for lack of evidence as to any direct, causal connection between Epton's activities and the Harlem riots of the summer of 1964. Defendant was sentenced to one year concurrent sentences on the three counts on which he was found guilty.

The defendant, a self-acknowledged Marxist and president of the Harlem "club" of the Progressive Labor Movement, a splinter communist club dedicated to violent revolution, was shown by the evidence on his trial to have been active in the Harlem community for many months prior to the 1964 riots. His activities before the riots, however, appear largely to have been limited to formation of a small cadre of followers, who, presumably, would play leadership roles in the eventual revolution toward which their movement was directed. There is no evidence in the record that Epton or his party at any time had a substantial following in the community, and one gets the distinct impression on reading the record that, had it not

been for the apparently spontaneous build-up of pressures within the Negro ghettos of New York City in the summer of 1964, following the killing of a fifteen year old Negro boy by an off-duty police lieutenant, Epton and his group might well have continued little noticed and of scant significance to anyone but themselves. There is, likewise, no evidence here that the defendant or his alleged co-conspirators had any hand in causing the riots that began on the evening of July 18, 1964, and it would appear that it was not until May, 1964, when tensions in Harlem had already heightened over the issue of police brutality, that Epton and the others seized upon the notion that this unrest in the community might be utilized by them in developing a mass following.

On the afternoon of the 18th, just before the riots began, Epton took to the streets of Harlem preaching his gospel of revolution and calling for organized resistance to the police. Addressing an audience numbering about 50 persons the defendant spoke of the need for violent action:

> "[W]e'll begin a campaign to organize a mass demonstration against the cops somewhere in this city. As it stands now, many organizations are talking and planning of where this demonstration is going to take place and we're not saying it's going to be a peaceful demonstration * * *. They [the cops] declared war on us and we should declare war on them and every time they kill one of us damn it, we'll kill one of them and we should start thinking that way right now * * * because we had better stop talking about violence as a dirty word * * *.
>
> "* * * If we're going to be free, and we will not be fully free until we smash this state completely and

totally. Destroy and set up a new state of our own choosing and of our own liking. And in that process of making this state, we're going to have to kill a lot of these cops, a lot of these judges, and we'll have to go up against their army. We'll organize our own militia and our own army * * *. Think about it because no people in this world have ever achieved independence and freedom through the ballot or having it legislated to them. All people in this world who are free got their freedom through struggle and through revolution. That's the way to gain freedom."

" * * * We will take our freedom. We will take it by any means necessary and any means necessary as we know the beast that we are dealing with is that we have to create a revolution in this country and we will create a new government that is run by the people * * *. Those who are ready to come with us and stand with us and join the Harlem Defense Council * * * will go back into their blocks and organize their blocks into defense committees so when the deal goes through they will be able to be in the street tens of thousands strong ready to face that man. And we know how to use weapons just like they know how to use weapons. And when the deal goes down we have to be ready to confront them and beat them * * *".

In the days that followed, the Harlem headquarters of the Progressive Labor Movement became a beehive of activity with the defendant exhorting those in attendance to organize their blocks to combat the police and with the defendant and his helpers feverishly getting out leaflets attacking the police. Much of this effort was directed to-

ward generating enthusiasm for a mass demonstration planned for July 25th. If the people's evidence is to be believed, and the jury was entitled to believe it, the only conclusion that can reasonably be drawn is that in the week following the commencement of the riots on the 18th, Epton and the others named as his co-conspirators were engaged in doing their utmost toward keeping the disturbance going and their purpose in planning the demonstration for the 25th was to trigger further violence and rioting.

Specific examples of the sort of evidence which justifies, if not compels, the conclusion that defendant and his alleged co-conspirators had agreed to try to incite the people of Harlem to further and continued rioting are the following:

1) Testimony by Detective Hart, the undercover police officer planted in defendant's group, to the effect that on July 19th, within sight and hearing of the ongoing riots, the defendant addressed a group of about thirty-five to forty persons at the Harlem headquarters of the Progressive Labor Movement, stating that the people of the area would have to organize to combat the police and that there were various means of defeating the police, including "suckering" the officers off the main avenues into the side streets away from other policemen where they could be killed one by one.

2) Testimony by another police officer, Patrolman Johnson, who was present in plain clothes at the Progressive Labor Movement headquarters on the night of the 19th, that he heard the defendant on that occasion, in answer to a question by a woman in the audience inquiring how they could fight the "cops", suggest that their "block cap-

tains" could teach them how to make weapons out of things in the street, informing his audience that when bottles are filled with a "certain substance" (presumably gasoline) they become "very effective" (as Molotov Cocktails).

3) Testimony by Hart that on the 21st the defendant told him that it was his wish to "start something" over in Brooklyn in order to spread thin the police forces concentrated in Harlem, and he was sending speakers to a rally there planned for the following day.

4) Wired with a "minifon", Hart on the 21st recorded a conversation involving the defendant, Hart, and certain others, wherein with respect to his planned demonstration set for the 25th, Epton said "Oh, it's going to lead to nothing but a slaughter, a massacre * * * a massacre."

5) On the 23rd the defendant allegedly told Hart of his arrangements for the march set for the 25th and how he hoped the crowd would react violently to his expected arrest.

Coupled with this evidence is the defendant's admitted responsibility for the production of thousands of inflammatory posters and pamphlets (although the trial court did hold that the one pamphlet for which defendant denied responsibility, containing instructions on the manufacture of molotov cocktails, had not been shown to be connected with the defendant's group, and thus, should be stricken as evidence). These publications seem clearly to have been designed to further arouse the already troubled people of Harlem. All in all, the people's evidence, most of which is not seriously disputed by the defendant, paints a picture of an organized campaign aimed at fostering continuance of the riots.

On this appeal, the defendant alleges many grounds upon which his convictions should be reversed, the principal ones being: [1] that his convictions on the counts in the indictment charging him with violation of §§160 and 161 of the Penal Law and with conspiracy to violate the aforesaid sections cannot stand on the ground that §§160 and 161 as construed by this court in *People* v. *Gitlow* (234 N.Y. 132) are an unconstitutional restraint on free speech; [2] that the Smith Act of 1940 (18 U.S.C. §2385) supersedes the enforceability of our criminal anarchy statute; [3] that his conviction for conspiracy to riot cannot stand because so much of the evidence against him on this count consisted of speech, therefore, a conviction on that count would amount to punishment directed solely at speech; [4] that he was illegally convicted of the crime of conspiracy to riot since conspiracy to riot was merged into the substantive charge of riot which was dismissed by the court. Finding defendant's contentions to be without merit, we affirm.

When we last considered the constitutionality of §§160, 161 of the Penal Law, we held, and the Supreme Court of the United States affirmed over the vigorous objection of Mr. Justices Holmes and Brandeis, that they were constitutional (*People* v. *Gitlow, supra;* aff'd sub nom. *Gitlow* v. *New York,* 268 U.S. 652). We are, of course, aware that the Supreme Court's view of the First Amendment's protection of speech has been altered drastically since *Gitlow* was decided. Although *Gitlow* has never been expressly overruled, it is now generally conceded that the Holmes-Brandeis view in *Gitlow* which insisted upon a showing of "clear and present danger" before one's freedom of speech may be abridged represents today's law (*Dennis* v. *United States,* 341 U.S. 494; *Yates* v. *United States,* 354 U.S. 298).

We are thus presented with a statute which is unconstitutional as interpreted. The dissent contends that our decision in *Gitlow* reflects the legislature's intent to make unlawful the mere advocacy of violent revolution, and that we are bound by our prior decision under the doctrine of *stare decisis*. We cannot agree.

It must be assumed that the legislature intended to enact a statute which was in harmony with the United States Constitution and the Constitution of the State of New York (*People* v. *Finkelstein*, 9 N Y 2d 342). When we first interpreted this statute in 1922, we did so in light of the prevailing conditions of that time and in accordance with the current understanding of first amendment freedoms. As we have noted, re-examination of our first amendment rights both by our Court and the Supreme Court of the United States, has resulted in a clearer understanding of the scope of constitutional protection of speech. We have not had an opportunity, however, until now, to re-examine our determination in *Gitlow* in light of the recent developments in constitutional theory. Now that our criminal anarchy statute is again before us, we have the obligation of construing it in accordance with sound constitutional principles so as to preserve its constitutionality (*People* v. *Finkelstein, supra* at 345; *Dollar Co.* v. *Canadian C & F Co.*, 220 N.Y. 270). In *Dollar*, this Court was presented with a statute which we had previously found to be constitutional. Subsequent holdings by the Supreme Court, however, made it clear that our previous interpretation of the statute in question was no longer in harmony with the Federal Constitution. The argument was made in *Dollar* that the court was bound under the doctrine of *stare decisis* to its previous interpretation and it could not reconstrue the statute in order

to sustain it. The court speaking through Chief Judge Hiscock stated:

> "The language of . . . [the statute] remains precisely as it was then and the rule governing our interpretation of it remains unchanged, and it seems to us that we are now bound to give to its language an interpretation which is in accordance with and not in defiance of the Constitution, even though such interpretation is different than the one which was given under a former and, as it must now be assumed, mistaken idea of the law. The obligation to construe the statute in accordance with the Constitution remain constant, and if the definition of the requirements of the Constitution in respect of this question has been changed, it seems inevitably to follow that we must place upon the statute a construction which will be so modified as to be in accordance with the latter view" (*Dollar Co.* v. *Canadian C & F Co., supra* at 277-8).

What are these sound constitutional requirements which must now be read into our criminal anarchy statute to preserve its constitutionality? It is clear that the proscription of mere advocacy of the violent overthrow of the government would be an unconstitutional infringement upon free speech (*Dennis* v. *United States, supra*). The advocacy of the overthrow of the government by force and violence must be accompanied by an intent to accomplish the overthrow (*Dennis* v. *United States, supra; Keyishian* v. *Board of Regents,* 385 U.S. 589) and there must be a "clear and present danger" that the advocated overthrow may be attempted or accomplished (*Dennis* v. *United States, supra*).

There is no doubt that Epton intended to inflame the already intense passions of the troubled people of Harlem and to incite them to greater violence. Furthermore, defendant's exhortations calling for organized resistance to the police and the destruction of the state, in the setting of Harlem during the week of July 18th, formed a sufficient basis for the trial court and jury to conclude that his words and actions created a "clear and present danger" that the riots then rocking Harlem would be intensified or, if they subsided, rekindled.

The dissent contends that our reinterpretation of the criminal anarchy statute in accordance with modern day constitutional standards violates the defendant's right to procedural due process since he was not given fair notice of what acts would be punished. Aside from the fact that the defendant can be charged "with knowledge of the scope of subsequent interpretation" by this Court (*Winters* v. *New York,* 333 U.S. 507, 514; *People* v. *Finkelstein,* 9 N Y 2d 342, 345-6), he had the benefit of the Supreme Court's interpretation in *Dennis* of the Smith Act (18 U.S.C. §2385), the language of which is practically identical to the language of our criminal anarchy statute.

While the defendant may find support in *Pennsylvania* v. *Nelson* (350 U.S. 497) for his contention that federal legislation has preempted the field of control of subversive activities, subsequent pronouncements by the Supreme Court have restricted the scope of the *Nelson* opinion and have left the defendant's contention without merit. In *Uphaus* v. *Wyman* (360 U.S. 72) and *DeGregory* v. *New Hampshire Atty. Gen.* (393 U.S. 925), the Court made it clear that a state could validly prosecute seditious activity directed against a state or local government even though Congress has preempted the field

of sedition which is directed against the Federal Government (see also, *Matter of Prensky* v. *Geller,* 22 A D 2d 559, lv. to app. den., 16 N Y 2d 486, app. dismd. 384 U.S. 101; *Matter of Goldstein* v. *Gellinoff,* 19 N Y 2d 792).

Defendant's contention that his conviction for conspiracy to riot cannot stand because so much of the evidence against him consisted of speech, misrepresents the gravamen of the conspiracy to riot charge. The gravamen of the charge is that the defendant entered into an unlawful agreement with others to incite and instigate riot and committed certain overt acts in furtherance of this end. Though speech may have been a means by which the defendant sought to further this end of the conspiracy, speech in and of itself is not the object of a prosecution for conspiracy to incite riot. There are, of course, First Amendment limitations upon prosecutions for non-speech crimes, where the evidence of such crimes consists solely of speech. As Chief Justice Vinson observed in *Dennis,* "Where an offense is specified by a statute in non-speech or non-press terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a 'clear and present danger' of attempting or accomplishing the prohibited crime" (*Dennis* v. *United States, supra* at 505). As was stated above, the evidence adduced by the people was more than sufficient to sustain a finding of a "clear and present danger" of riot.

Defendant's argument that the crime of conspiracy to incite riot necessarily merges in the crime of riot is equally ill-founded. It is well settled that conspiracy is an independent crime for which a defendant can be indicted in addition to being indicted for the substantive crime he allegedly conspired to commit (*People* v. *Tavormina,* 257

N.Y. 84). A conspiracy to riot is quite separable from the riot itself. The essence of a conspiracy is an agreement or plan among two or more persons to commit a crime in the future. The crime of riot, however, is not committed until three or more persons, actually assembled, have disturbed or immediately threatened the public peace. A previous agreement or plan is not a necessary element of the crime (Penal Law §§2090, 2091). One who agrees with others to organize a riot sometime in the future and who commits an overt act pursuant to that agreement is guilty not of riot but of conspiracy to riot. Therefore, the conspiracy to riot charge and the conviction thereof was proper.

We have examined the other contentions raised by the defendant and have found them to be equally lacking in merit. Accordingly, the judgment of the Appellate Division affirming the defendant's conviction for the crimes of conspiracy to riot, conspiracy to commit the crime of advocacy of criminal anarchy and advocacy of criminal anarchy should be affirmed.

BURKE, *J.* (dissenting in part):

While I am in agreement with the majority of the Court that this defendant's conviction on the count in the indictment charging him with conspiring with certain named others to incite riot should be affirmed, I am constrained to dissent from so much of today's holding as affirms his conviction on the counts based on New York's criminal anarchy statute (Penal Law, §§ 160 and 161).

"It is settled law that a statute so vague and indefinite, in form *and as interpreted,* as to permit within the scope of its language the punishment of incidents fairly within the

protection of the guarantee of free speech is void, on its face, as contary to the Fourteenth Amendment." (*Winters* v. *New York,* 333 U.S. 507, 509; emphasis added.) New York's criminal anarchy statute is such a statute. It was authoritatively construed by this Court in 1922 to permit a criminal conviction for speech without any showing that a "clear and present danger" of harm existed. (*People* v. *Gitlow,* 234 N.Y. 132.) The Court there was satisfied that mere advocacy of such doctrine was sufficient to support the imposition of criminal liability. (See *People* v. *Gitlow, supra,* at 138 and 150-51.) This view of the state's power to limit speech is not, of course, good law today, and the dissent of Justices Holmes and Brandeis in the Supreme Court in the *Gitlow* case (268 U.S. 652, 672-73), calling for a showing of clear and present danger before speech may be outlawed, is now recognized as representing the proper view. (See, *e.g., Yates* v. *United States,* 354 U.S. 298, 318; *Dennis* v. *United States,* 341 U.S. 494, 507 and 541.) The *Gitlow* decision did, however, I submit, reflect that intention which the legislature had in enacting sections 160 and 161 of the Penal Law, and I am of the opinion that the attempt by the Court today to so limit the statute as to preserve it from unconstitutionality cannot, at least with respect to this defendant, cure the defect of overbroadness which inheres in this statute as written and as authoritatively construed in *People* v. *Gitlow.*

The usual rule is that once a statute has been interpreted by the courts this interpretation becomes as much a part of the enactment as if incorporated into the language of the act itself and is binding upon subsequent courts in accordance with the rules of *stare decisis* and the doctrine of precedent. (See McKinney's Consol. Laws of N.Y., Stat-

utes, Book 1, § 72, and the cases cited therein.) Today, however, this principle is rejected on the ground that statutes are to be construed so as to preserve them from unconstitutionality, if possible (see *People* v. *Finkelstein,* 9 N.Y. 2d 342), a sound enough guide to construction, but only a guide, and out of place where construction is not called for, where we know from the language of a statute and from its history what it was the legislature intended to achieve in enacting it. When, as here, we have once ascertained what the legislature sought to do in enacting a statute (and in the case of our criminal anarchy statute we can have no real doubt that our legislature did in fact intend to make unlawful the mere advocacy of such doctrine, with no requirement that this advocacy constitute a clear and present danger), the nature of our function demands that we adhere to our earlier interpretation of the statute. We are not an extension of the legislature, authorized to rewrite statutes through constant "reinterpretation" designed to effectuate what we divine the legislature *would* or *should* now desire the law to be. The Court's present invocation of a canon of construction calling for a statute to be construed so as to preserve its constitutionality, designed only to aid in resolving ambiguities, constitutes in this setting, in which no member of the Court has any doubts about the intent of the legislature, the usurpation of "a power which our democracy has lodged in its elected legislature." (Frankfurter, Some Reflections on the Reading of Statutes, 1947 Cardozo Lectures before the Association of the Bar of the City of New York, p. 13, 47 Col. L. Rev. 527, 533 [1947]. See also McKinney's Statutes, § 73 on Judicial Legislation and the cases cited therein.)

The majority cite *Dollar Co.* v. *Canadian C. & F. Co.* (220 N.Y. 270) as authority for their undertaking to reinterpret §§ 160 and 161 so as to preserve them from unconstitutionality. They fail, however, to mention anything at all about the nature of the statute there involved or about the nature of the alleged constitutional defects in this Court's prior decision involving that statute. There, in fact, all that was involved was a statute describing how service of process might be made on a foreign corporation, namely by service on certain officers within this State. The statute was on its face constitutional. The only problem was that in earlier cases such service had been held sufficient to give our courts jurisdiction over foreign corporations whose officers happened to have been served here but which did not *do business* in this State, with this Court *assuming* that jurisdiction could be acquired over such corporations by the mere device of serving their officers here. (See, *e.g.*, *Pope* v. *Terre Haute Car & Mfg. Co.*, 87 N.Y. 137.) This view of the permissible limits of our exercise of jurisdiction was later seen to be unconstitutional and in *Dollar* the question was raised whether the statute must fall in its entirety even where there was a constitutional basis for jurisdiction. The Court was apparently quite troubled by the difficulties it envisioned in upholding the statute, but under present day analysis it seems clear that this difficulty was more apparent than real, for the most that could possibly be said for the Court's earlier treatment of the statute was that it amounted to an unconstitutional application of a statute clearly constitutional on its face. In fact, it can even be argued that in the earlier cases this statute was not viewed as the basis for the exercise of jurisdiction, but only as descriptive of the manner in which service of process

was to be made, assuming the courts of this State had a basis for such jurisdiction. The Court's remarking in *Dollar* that it "did not read into the statute any new words or affix any new, peculiar or unalterable meaning to the words which were there" (220 N.Y. at 277) is, in effect, recognition that there was in fact no problem of redefining legislative intent there. This, of course, is far different from what is undertaken today.

Over and above the impropriety of such judicial legislation, however, is the more serious problem of the Court's allowing an apparently moribund statute, whose previous authoritative construction would today clearly be held unconstitutional, to be invoked as a means of punishing speech. This seems clearly unconstitutional, as parties should be entitled in this favored area of conduct to rely upon a relatively stable and certain body of law. As the Supreme Court has noted, "A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under *procedural due process* and freedom of speech or press." (*Winters* v. *New York, supra,* at 509-10; emphasis supplied.) While the decisions of the United States Supreme Court indicate that once an acceptable limiting construction has been obtained for a criminal statute affecting speech it may be applied to conduct occurring prior to that construction (see cases cited in *Dombrowski* v. *Pfister,* 380 U.S. 479, 491, n. 7), there must be afforded fair warning to defendants before such application. In *Dombrowski* v. *Pfister* (*supra*) the Supreme Court in this connection and with apparent approval cited *Lanzetta* v. *New Jersey* (306 U.S. 451; cited

in *Dombrowski* v. *Pfister, supra,* at 491, n. 7). In *Lanzetta* the court made clear that a penal statute, in order not to offend due process, must prescribe rules of conduct and warn against transgression. It observed that where "men of common intelligence must necessarily guess at its meaning and differ as to its application" a penal statute cannot stand (306 U.S. 451, 453). Such a statute is our criminal anarchy statute as it is presently being invoked.

Sections 160 and 161 of our Penal Law declare that the advocacy of criminal anarchy is a felony. Section 161 declares that it is punishable by imprisonment for not more than ten years, or a fine of not more than five thousand dollars, or both. Such a harsh penal statute directed against speech may not, I submit, remain in as long suspense as to its applicability as our criminal anarchy statute did following our *Gitlow* decision. Procedural due process is offended by its invocation where no one, prior to today, would have been able to predict with any degree of confidence what treatment the statute would receive from the courts. In fact, its authoritative construction by this court indicated that it was unconstitutionally broad. Though it remained on our statute books, as construed originally, it was a dead letter. Its attempted revival is in my view unconstitutional.

I would modify the judgment below to the extent of reversing defendant's conviction on the two counts in the indictment based on §§ 160 and 161 of our Penal Law.

Judgment affirmed. Opinion by Scileppi, *J.* All concur except Burke, *J.*, who dissents, in part, and votes to modify as to two counts in the indictment in an opinion and Breitel, *J.*, taking no part.

APPENDIX B

Statutes Involved

New York Penal Law (McKinney's Consolidated Laws of New York)

§160. *Criminal anarchy defined*

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

§161. *Advocacy of criminal anarchy*

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

§580. *Definition and punishment of conspiracy*

If two or more persons conspire:

1. To commit a crime; or,

2. Falsely and maliciously to indict another for a crime, or to procure another to be complained of or arrested for a crime; or,

3. Falsely to institute or maintain an action or special proceeding; or,

4. To cheat and defraud another out of property, by any means which are in themselves criminal, or which, if executed, would amount to a cheat, or to obtain money or any other property by false pretenses; or,

5. To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force,

threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof; or,

6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws,

Each of them is guilty of a misdemeanor.

§2090. *Riot defined*

Whenever three or more persons, having assembled for any purpose, disturb the public peace, by using force or violence to any other person, or to property, or threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they are guilty of riot.

New York Judiciary Law (McKinney's Consolidated Laws of New York)

§596. *Qualifications of jurors*

In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a persons must: 1. Be a citizen of the United States, and a resident of the county.

2. Be not less than twenty-one, nor more than seventy years of age.

3. Be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dol-

lars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value.

4. Be in the possession of his natural faculties and not infirm or decrepit.

5. Not have been convicted of a felony or a misdemeanor involving moral turpitude.

6. Be intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly.

A person dwelling or lodging or having or maintaining a dwelling or lodging in a county for the greater part of the time between October first and June thirtieth next thereafter, is a resident of that county, within the meaning of this section.

APPENDIX C

Indictment

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

—against—

WILLIAM EPTON,

Defendant.

THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment, accuse the defendant of the crime of CONSPIRACY in violation of Section 580 of the Penal Law, committed as follows:

The defendant, Vivian Anderson, William McAdoo, David Douglas, Otis Chestnut, Harold Young, Michael Crenovich and others, in the County of New York, from on or about July 16, 1964, continuously up to on or about July 25, 1964, did knowingly, wilfully, wrongfully, unlawfully and corruptly conspire with each other to commit a crime in violation of Section 2090 of the Penal Law in that the conspirators did agree to participate in a riot by instigating, promoting, aiding, abetting, counseling, commanding, inducing and procuring an assembly of more than three persons which disturbed the public peace by using force and violence to police officers of the City of New York.

Overt Acts

In furtherance of said conspiracy and to effect the objects thereof, the conspirators in the County of New York committed and caused to be committed the following overt acts:

1. On or about July 16, 1964 the defendant conferred with others.
2. On or about July 17, 1964 the conspirators prepared and distributed a leaflet entitled "Stop the Cops!"
3. On or about July 18, 1964 the defendant made a speech wherein he discussed the killing of cops and judges.
4. On or about July 19, 1964 the defendant discussed the preparation of a "Wanted for Murder" leaflet.
5. On or about July 19, 1964 a second leaflet entitled "Stop the Cops" was prepared and distributed.
6. On or about July 19, 1964 the defendant made a speech wherein he discussed the killing of police officials.
7. On or about July 19, 1964 the defendant discussed the use of Molotov cocktails.
8. On or about July 19, 1964 the defendant discussed on a number of occasions the production of a "Molotov Cocktail" leaflet.
9. On or about July 20, 1964 the defendant distributed copies of a "Wanted for Murder" leaflet.
10. On or about July 20, 1964 the defendant prepared and distributed a leaflet entitled "Organize Your Blocks."

11. On or about July 20, 1964 the defendant discussed starting disturbances in Brooklyn, New York.

12. On or about July 21, 1964 the defendant caused to be printed additional copies of a "Wanted for Murder" leaflet.

13. On or about July 21, 1964 the defendant possessed copies of a leaflet entitled "Stop the Killer Cops Now."

14. On or about July 24, 1964 the defendant prepared a leaflet entitled "Murphy Has Violated Our Constitutional Rights."

15. On or about July 25, 1964 the defendant conferred with others.

Second Count:

AND THE GRAND JURY AFORESAID, by this indictment further accuse the defendant of the RIOT, in violation of Section 2090 of the Penal Law, committed as follows:

The defendant from on or about July 16, 1964, continuously up to on or about July 25, 1964, did participate in a riot by being personally present among and by instigating, promoting, aiding, abetting, counseling, inducing and procuring an assembly of more than three persons which disturbed the peace by using force and violence to police officers of the City of New York.

That the said defendant did participate in and instigate, promote, aid, abet, counsel, command, induce and procure others to unlawfully assemble for the purpose of resisting the enforcement of certain statutes of the state and of obstructing public officers of this state in the performance of their duties.

Third Count:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of CONSPIRACY, in violation of Section 580 of the Penal Law, committed as follows:

The defendant, Vivian Anderson, William McAdoo, David Douglas, Otis Chestnut, Harold Young, Michael Crenovich and others in the County of New York from on or about November 1, 1963, to on or about July 25, 1964, did knowingly, wilfully, wrongfully, unlawfully and corruptly conspire with each other to commit a crime in violation of Section 161 of the Penal Law, in that the conspirators did agree to advocate, advise and teach, by word of mouth and writing, the duty, necessity and propriety of overthrowing and overturning the organized government of the State of New York by assassination of the executive officials of the government and by force and violence.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the conspirators in the County of New York committed and caused to be committed the following overt acts:

1. On or about November 22, 1963 the defendant discussed certain tactics to be used against the police.
2. On or about January 2, 1964 the defendant conferred with another regarding secrecy of communications.
3. On or about January 23, 1964 the defendant prepared and distributed printed material entitled the "Right to Revolution."

4. On or about March 9, 1964 the defendant discussed the use of firearms.

5. On or about March 9, 1964 the defendant stated he would provide ammunition and firearms.

6. On or about March 28, 1964 the defendant met with others at 8503 Broadway in New York City.

7. On or about April 21, 1964 a plan for organizing and arming others was discussed.

8. On or about May 5, 1964 the use of rifles was discussed.

9. On or about May 19, 1964 the defendant possessed a number of smoke bombs.

10. On or about July 7, 1964 a meeting was held at 224 Riverside Drive, whereat an armed revolution was discussed.

11. On or about July 16, 1964 the defendant conferred with others.

12. On or about July 17, 1964 the conspirators prepared and distributed a leaflet entitled "Stop the Cops!"

13. On or about July 18, 1964 the defendant made a speech wherein he discussed the killing of cops and judges.

14. On or about July 19, 1964 the defendant discussed the preparation of a "Wanted for Murder" leaflet.

15. On or about July 19, 1964 a second leaflet entitled "Stop the Cops" was prepared and distributed.

16. On or about July 19, 1964 the defendant made a speech wherein he discussed the killing of police officials.

17. On or about July 19, 1964 the defendant discussed the use of Molotov cocktails.

18. On or about July 19, 1964 the defendant discussed on a number of occasions the production of a "Molotov Cocktail" leaflet.

19. On or about July 20, 1964 the defendant distributed copies of a "Wanted for Murder" leaflet.

20. On or about July 20, 1964 the defendant prepared and distributed a leaflet entitled "Organize Your Blocks."

21. On or about July 20, 1964 the defendant discussed starting disturbances in Brooklyn, New York.

22. On or about July 21, 1964 the defendant caused to be printed additional copies of a "Wanted for Murder" leaflet.

23. On or about July 21, 1964 the defendant possessed copies of a leaflet entitled "Stop the Killer Cops Now."

24. On or about July 24, 1964 the defendant prepared a leaflet entitled "Murphy Has Violated Our Constitutional Rights."

25. On or about July 25, 1964 the defendant conferred with others.

Fourth Count:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of ADVOCACY OF CRIMINAL ANARCHY, in violation of Section 161 of the Penal Law, committed as follows:

That the said defendant from on or about July 16, 1964, continuously up to on or about July 25, 1964, feloniously did advocate, advise and teach the propriety of overthrowing and overturning the organized government of the State of New York by assassination of the executive officials of the government and by force and violence.

FRANK S. HOGAN
District Attorney